No. 15-1251

Title:	National Labor Relations Board, Petitioner v. SW General, Inc., dba Southwest Ambulance
Docketed:	April 7, 2016
Lower Ct:	United States Court of Appeals for the District of Columbia Circuit
Case Nos.:	(14-1107, 14-1121)
Decision Date:	August 7, 2015
Rehearing Denied:	January 20, 2016

Questions Presented

---Date---	------Proceedings and Orders----------
Apr 6 2016	Petition for a writ of certiorari filed. (Response due May 9, 2016)
May 9 2016	Brief of respondent SW General, Inc., dba Southwest Ambulance in opposition filed.
May 24 2016	DISTRIBUTED for Conference of June 9, 2016.
May 24 2016	Reply of petitioner National Labor Relations Board filed. (Distributed)
Jun 10 2016	Letter dated June 9, 2016, received from the Solicitor General calling the Court's attention to a new decision from the United States Court of Appeals for the Third Circuit. (Distributed)
Jun 13 2016	DISTRIBUTED for Conference of June 16, 2016.
Jun 20 2016	Petition GRANTED.
Jun 30 2016	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 12, 2016.
Jun 30 2016	The time to file respondent's brief on the merits is extended to and including September 19, 2016.
Aug 5 2016	Motion to dispense with printing the joint appendix filed by petitioner National Labor Relations Board.
Aug 12 2016	Brief of petitioner National Labor Relations Board filed.
Aug 18 2016	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed.
Aug 19 2016	Brief amicus curiae of Constitutional Accountability Center filed.
Sep 2 2016	SET FOR ARGUMENT On Monday, November 7, 2016
Sep 9 2016	Record has been requested from the U.S.C.A. District of Columbia Circuit.
Sep 19 2016	Brief of respondent SW General, Inc., dba Southwest Ambulance filed.
Sep 23 2016	Record received from the U.S.C.A. District of Columbia Circuit is electronic and located on PACER.
Sep 23 2016	Brief amicus curiae of Southeastern Legal Foundation filed.
Sep 26 2016	Brief amicus curiae of Morton Rosenberg filed.
Sep 26 2016	Brief amici curiae of Washington Legal Foundation and Allied Educational Foundation filed.
Sep 26 2016	Brief amici curiae of National Federation of Independent Business, et al. filed. (Distributed)

Sep 26 2016	Brief amicus curiae of Chamber of Commerce of the United States filed. (Distributed)
Sep 26 2016	Brief amici curiae of Senators John McCain and Thom Tillis urging affirmance filed. (Distributed)
Sep 26 2016	Brief amici curiae of West Virginia, et al. filed. (Distributed)
Sep 26 2016	Brief amicus curiae of Cato Institute filed. (Distributed)
Sep 28 2016	CIRCULATED
Oct 3 2016	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Oct 19 2016	Reply of petitioner National Labor Relations Board filed. (Distributed)
Nov 7 2016	Argued. For petitioner: Ian H. Gershengorn, Acting Solicitor General, Department of Justice, Washington, D. C. For respondent: Shay Dvoretzky, Washington, D. C.
Mar 21 2017	Adjudged to be AFFIRMED. Roberts, C. J., delivered the opinion of the Court, in which Kennedy, Thomas, Breyer, Alito, and Kagan, JJ., joined. Thomas, J., filed a concurring opinion. Sotomayor, J., filed a dissenting opinion, in which Ginsburg, J., joined.

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Supreme Court, U.S.
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No. 15-1251

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Many important government posts must be filled by persons who are nominated by the President and confirmed by the Senate. The Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.*, provides that when such an office is vacant, its functions and duties may be performed temporarily in an acting capacity by either the first assistant to the vacant post, under Section 3345(a)(1); a Senate-confirmed official occupying another office in the Executive Branch who is designated by the President under Section 3345(a)(2); or a senior official in the same agency designated by the President under Section 3345(a)(3).

Section 3345(b) of the FVRA provides as a general rule that "[n]othwithstanding subsection (a)(1)," a person who is nominated to fill a vacant office that is subject to the FVRA may not perform the office's functions and duties in an acting capacity unless the person served as first assistant to the vacant office for at least 90 days in the year preceding the vacancy. 5 U.S.C. 3345(b).

The question presented is whether the precondition in 5 U.S.C. 3345(b)(1) on service in an acting capacity by a person nominated by the President to fill the office on a permanent basis applies only to first assistants who take office under Subsection (a)(1) of 5 U.S.C. 3345, or whether it also limits acting service by officials who assume acting responsibilities under Subsections (a)(2) and (a)(3).

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TABLE OF AUTHORITIES

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Hooks v. *Kitsap Tenant Support Servs., Inc.*, No. 13-35912, 2016 WL 860335 (9th Cir. Mar. 7, 2016) 29

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5 U.S.C. 3345(b)(1) ..... *passim*, 117a
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Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-177, 112 Stat. 2681 2
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Miscellaneous:

144 Cong. Rec.:
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p. 12,434 19
(Sept. 25, 1998):
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(Sept. 28, 1998):
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pp. 22,512-22,514 24
pp. 22,515-22,518 24
p. 22,519 25
pp. 22,519-22,520 24
pp. 22,524-22,525 24
p. 22,526 24
(Oct. 21, 1998):
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p. 27,498 26
159 Cong. Rec. S16-S17 (daily ed. Jan. 3, 2013) 7
Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177 (2001) 18
Sydney J. Freedberg, Jr., *McCain Forces Fanning to Step Aside as Acting Army Secretary*, Breaking Def. (Jan. 11, 2016), http://breakingdefense.com/2016/01/mccain-forces-fanning-to-step-aside-as-acting-army-secretary/ 28

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Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60 (1999) 4, 5

Letter from James M. Inhofe, Chairman, U.S. Senate Comm. on Env't & Pub. Works, to Gina McCarthy, Adm'r, U.S. Envtl. Prot. Agency (Mar. 8, 2016), http://www.epw.senate.gov/public/_cache/files/0da0f6d1-1eed-43f5-aa11-9dec604fa31d/meiburg-030816-letter-to-epa.pdf. 29

Letter from Carlotta C. Joyner, Dir., Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R (Feb. 23, 2001), http://www.gao.gov/assets/80/75036.pdf 5, 23

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Oversight of the Implementation of the Vacancies Act: Hearing Before the Senate Comm. on Governmental Affairs, 105th Cong., 2d Sess. (1998) 19

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In the Supreme Court of the United States

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the National Labor Relations Board, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 796 F.3d 67. The decision and order of the National Labor Relations Board (App., *infra*, 31a-74a) is reported at 360 N.L.R.B. No. 109. The decision by the administrative law judge (App., *infra*, 75a-111a) is available at 2013 WL 4041158.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2015. A petition for rehearing was denied on January 20, 2016 (App., *infra*, 112a-115a). The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The pertinent provision of the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345, is reproduced in the appendix to this petition. App., *infra*, 116a-118a.

STATEMENT

1. a. Congress enacted the Federal Vacancies Reform Act of 1998 (FVRA or Act), 5 U.S.C. 3345 *et seq.*, as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-577, 112 Stat. 2681. The FVRA sets forth procedures for temporarily filling Executive Branch offices that can be filled on a permanent basis only by persons who are nominated by the President and confirmed by the Senate. These positions are generally known as presidentially appointed, Senate-confirmed offices, or "PAS" offices. There are more than a thousand such offices, comprising the most important positions in the Executive Branch.

The FVRA regulates who may perform the functions and duties of a vacant PAS office in an acting capacity, 5 U.S.C. 3345, and how long they may serve in that capacity, 5 U.S.C. 3346; it restricts agencies' abilities to name acting officers under other statutes, 5 U.S.C. 3347; and it constrains the effect of certain actions taken by individuals who have not been designated to act in conformity with the statute, 5 U.S.C. 3348.

The limitations on who may temporarily perform the duties of vacant PAS offices are set out at 5 U.S.C. 3345. The first paragraph of the provision—Subsection (a)(1)—establishes the general rule: When a PAS office becomes vacant, the "first assistant" to that

office "shall perform" the office's functions and duties in an acting capacity. 5 U.S.C. 3345(a)(1). The FVRA then establishes four exceptions to that general rule.

The first two exceptions are in the next two paragraphs of Subsection (a) of Section 3345, which set out alternative methods the President may invoke to designate an acting officer. Paragraph (2) provides that "notwithstanding paragraph (1)," the President may direct a person who already serves in another PAS position to perform the duties of the vacant office. 5 U.S.C. 3345(a)(2). Paragraph (3) provides that "notwithstanding paragraph (1)," the President may direct a person to perform the functions and duties of a vacant office if the person has served in a senior position (defined as a position with a rate of pay equal to the minimum for a GS-15 or higher) in the agency at issue for at least 90 days in the year preceding the vacancy. 5 U.S.C. 3345(a)(3).

Subsection (c) creates a third exception to the general rule that the first assistant shall perform the functions and duties of the vacant office. It provides that "[n]otwithstanding subsection (a)(1)," the President may designate an officer who has been nominated "for reappointment for an additional term to the same office" to perform the functions and duties of the office until the Senate has acted to confirm or reject the nomination. 5 U.S.C. 3345(c).

Subsection (b)(1)—the provision at issue below—creates the final exception to the general rule that the first assistant shall perform the functions and duties of the vacant office. Using language that parallels the exceptions in Subsections (a)(2), (a)(3), and (c), it states that "[n]otwithstanding subsection (a)(1), a person may not serve as an acting officer for an office

under this section" if the President nominates him for the vacant PAS office and, during the year preceding the vacancy, he "did not serve in the position of first assistant" or "served in the position of first assistant" for less than 90 days. 5 U.S.C. 3345(b)(1). Subsection (b)(2) then provides that this restriction does not apply if "such person is serving as the first assistant to the office of an officer described under subsection (a)" and that first-assistant position is itself a PAS office to which the acting officer had been confirmed. 5 U.S.C. 3345(b)(2).

The FVRA provides that certain actions taken by officials who do not serve in conformity with the FVRA "shall have no force or effect" and "may not be ratified." 5 U.S.C. 3348(d)(1) and (2).

b. Five months after the FVRA's enactment, the Office of Legal Counsel (OLC) in the Department of Justice (DOJ) issued guidance concerning the statute's construction. Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60 (1999). OLC construed the limitation in Subsection (b)(1) on a nominee serving as the acting officer "[n]otwithstanding subsection (a)(1)" as a limitation that "applies only to persons who serve as acting officers by virtue of having been the first assistant to the office"—*i.e.* only to persons who automatically assume acting status based on the general rule in Subsection (a)(1) that is directly mentioned in Subsection (b)(1). *Id.* at 64. Thus, OLC concluded, the restriction in Subsection (b)(1) does not apply to Senate-confirmed officers who have been directed by the President to serve in an acting capacity under Subsection (a)(2), and to senior agency officials who have been directed by the President to serve in an acting

capacity under Subsection (a)(3). *Ibid.* The General Accounting Office, an instrumentality of Congress, has also construed the requirements of Subsection (b)(1) as applicable only to first assistants who automatically assume acting status under Subsection (a)(1). See Letter from Carlotta C. Joyner, Director, Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R, at 3-4 (Feb. 23, 2001), http://www.gao.gov/assets/80/75036.pdf (Joyner).

In accordance with that construction, every President since the FVRA's enactment has made nominations premised on the understanding that the limitation in Subsection (b)(1) generally requiring 90 days of service as a first assistant during the past year does not apply to persons who become acting officers under Subsection (a)(2) or (a)(3). Nominees serving in an acting capacity on the basis of the Executive Branch's longstanding interpretation have been routinely confirmed by the Senate. For instance, within a year of the FVRA's enactment, President Clinton nominated David Ogden, who had previously served in a senior position in the Department of Justice and was serving as Acting Assistant Attorney General pursuant to Subsection (a)(3), to fill the Assistant Attorney General post on a permanent basis. Ogden continued serving while his nomination was pending, consistent with OLC guidance, because he had not ascended to the acting post from a first-assistant position pursuant to Subsection (a)(1). After approximately 18 months of service in an acting capacity while his nomination was pending, Ogden was confirmed by the Senate in

December 2000. President Clinton also nominated and the Senate confirmed a number of other persons who served as both nominees and acting officials pursuant to Subsections (a)(2) and (a)(3), including high-level officials at multiple government departments.

President George W. Bush relied on the same interpretation in making nominations of acting officers to fill high-level posts across multiple departments—including nominations that the Senate ultimately confirmed. For example, acting officials in the Bush Administration who continued to serve pursuant to Subsections (a)(2) or (a)(3) following nomination, and were then confirmed by the Senate, include, within the Department of Justice alone: James B. Comey for Deputy Attorney General; Paul J. McNulty, who later held the same post; R. Hewitt Pate, Assistant Attorney General for the Antitrust Division; Christopher Wray, Assistant Attorney General for the Criminal Division; Michele M. Leonhart, Deputy Administrator of the Drug Enforcement Administration; and John F. Clark, Director of the Marshals Service.

That practice has continued to the present day. A number of high-level appointees in the present Administration were both nominated and confirmed to offices the functions and duties of which they performed temporarily pursuant to Subsection (a)(2) or (a)(3). And at the present time, approximately half a dozen senior positions are filled by acting officers who serve pursuant to Subsection (a)(2) or (a)(3), and who have also been nominated to fill those offices on a permanent basis. These include high-level officials who serve in the Department of Treasury; Department of Health and Human Services (HHS); Environmental Protection Agency (EPA); Department of

Transportation (DOT); and Office of Personnel Management (OPM).

2. a. The National Labor Relations Board (NLRB or Board) is an independent agency charged with the administration of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* Its General Counsel is appointed by the President with the advice and consent of the Senate. 29 U.S.C. 153(d). The General Counsel has "final authority * * * in respect of" the issuance of complaints alleging that an individual has committed an unfair labor practice. *Ibid.*; see 29 U.S.C. 160(b).

In June 2010, after the NLRB's General Counsel resigned, the President directed senior NLRB official Lafe Solomon to serve as the Board's Acting General Counsel. App., *infra*, 5a. Solomon satisfied the requirements for acting service under 5 U.S.C. 3345(a)(3) because he had spent the previous ten years as the Director of the NLRB's Office of Representation Appeals. App., *infra*, 11a.

In January 2011, the President nominated Solomon to serve as NLRB General Counsel on a permanent basis. App., *infra*, 11a. Solomon's nomination was not acted upon during the 112th Congress, so it was returned to the President at the expiration of that Congress in accordance with Senate rules. 159 Cong. Rec. S16-S17 (daily ed. Jan. 3, 2013). The President resubmitted Solomon's nomination in May 2013, but later withdrew that nomination and put forward a different nominee (who was later confirmed). App., *infra*, 6a.

b. In January 2013, while Solomon was performing the duties of the NLRB General Counsel on an acting basis, the Regional Director, acting on behalf of the

General Counsel, issued a complaint alleging an unfair labor practice by respondent, a provider of ambulance services. The complaint alleged that respondent had unilaterally discontinued longevity payments to its emergency medical technicians, nurses, and paramedics, in violation of Subsections 8(a)(1) and (5) of the NLRA, 29 U.S.C. 158(a)(1) and (5). App., *infra*, 7a. An administrative law judge (ALJ) determined that respondent had committed an unfair labor practice, and the NLRB agreed upon review, adopting the recommended order of the ALJ with minor modifications. *Ibid.*

c. Respondent filed a petition for review in the United States Court of Appeals for the D.C. Circuit, and the NLRB filed a cross-petition for enforcement of its order. App., *infra*, 7a; see 29 U.S.C. 160(e) and (f). Respondent argued that the complaint charging an unfair labor practice had been unauthorized, because Solomon could not legally perform the duties of General Counsel after he was nominated to fill that position permanently. App., *infra*, 7a, 11a. In respondent's view, the portion of 5 U.S.C. 3345(b)(1) preventing a nominee from serving as an acting officer unless he had served as first assistant to that office for at least 90 days in the year preceding the vacancy applied not only to first assistants temporarily serving pursuant to Subsection (a)(1), but also to individuals serving under Subsection (a)(2) or (a)(3) of Section 3345. App., *infra*. 11a.

The court of appeals granted respondent's petition for review and vacated the Board's order. App., *infra*, 1a-30a. Rejecting the longstanding interpretation of the Executive Branch, the court concluded that the precondition in Subsection (b)(1) for a nominee to

serve in an acting capacity applied not only to first assistants serving under Subsection (a)(1), but also to presidentially appointed, Senate-confirmed officials directed by the President to perform the functions and duties of another position on an acting basis under Subsection (a)(2), and to senior agency officials directed by the President to do so under Subsection (a)(3). *Id.* at 20a.

The court of appeals concluded that "the text of the FVRA plainly support[ed]" this view. App., *infra*, 17a. It found the "clearest indication" of the subsection's scope to be the subsection's reference to "a person" serving as an acting officer "under this section." *Id.* at 12a (emphasis and citation omitted). That language, the court surmised, indicated that Subsection (b)(1) reached "the full spectrum of possible candidates for acting officer" under Section 3345 in its entirety. *Ibid.*

The court of appeals did not draw any contrary indication from Subsection (b)(1)'s directive that it applied "[n]otwithstanding subsection (a)(1)"—the subsection exclusively directed to automatic assumption of acting capacity by first assistants. App., *infra*, 13a; see *id.* at 13a-15a. The court reasoned that Congress had included that language to make clear that the limits in Subsection (b)(1) override the rule for first-assistant service set forth in Subsection (a)(1). But it concluded that "apart from setting out an order of operations, the 'notwithstanding' clause has no significance for the ultimate scope of subsection (b)(1)." *Id.* at 14a. The court also believed that the government's interpretation of Subsection (b)(1) as limited to first assistants serving pursuant to Subsection (a)(1) rendered superfluous language in Subsection (b)(2)(A)

permitting an acting officer to become a nominee if he "is serving as first assistant" at the time of the nomination and other preconditions are met. *Id.* at 16a.

The court of appeals identified nothing in the statute's legislative history or purpose that countermanded its reading of the text. The court saw little clarity in the FVRA's legislative history, App., *infra*, 17a-20a, and it did not see its interpretation as in tension with the purposes of Subsections (a)(2) and (a)(3) because individuals could still be directed to serve in an acting capacity under those subsections, but simply could not be both acting officers and nominees. The court accordingly "h[e]ld that the prohibition in subsection (b)(1) applies to all acting officers, no matter whether they serve pursuant to subsection (a)(1), (a)(2) or (a)(3)." *Id.* at 20a. Because "Solomon was never a first assistant and the President nominated him to be General Counsel on January 5, 2011," the court of appeals concluded that "the FVRA prohibited [Solomon] from serving as Acting General Counsel from that date forward."[1] *Ibid.* It concluded that Solomon was not properly serving as Acting General Counsel when petitioner issued an unfair labor practice complaint against respondent. It also found that neither harmless-error principles nor the de facto officer doctrine rendered the unfair labor practice complaint

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[1] The court of appeals noted that the government had not argued that even if Solomon's service as Acting General Counsel was prohibited while Solomon's nomination was pending, the unfair labor practice complaint here was validly issued because Solomon's acting service was again legitimate in the period between when his nomination was returned and when the President resubmitted the nomination. App., *infra*, 7a n.3. The court treated any such argument as waived. *Ibid.* Petitioner does not seek review of that conclusion.

valid regardless of whether Solomon's appointment violated the FVRA. *Id.* at 20a-30a.

d. The court of appeals denied rehearing en banc by a vote of 7-3, over the dissenting votes of Judges Brown, Kavanaugh, and Millett. App., *infra*, 114a-115a.

REASONS FOR GRANTING THE PETITION

The decision below repudiates an interpretation of the FVRA on which every President since the statute's enactment has relied. It misreads the Act's text and structure, and severely constrains the President's power in a manner that does not effectuate the Act's purposes. If left in place, the decision will cast a cloud over the service of past and current officers at high levels of government. And because challenges to the actions of virtually every administrative agency can be brought in the District of Columbia, the decision below, if left in place, will pose a significant impediment to the ability of any President going forward to temporarily fill important posts in the Executive Branch with the persons whom the President deems most qualified to fill them permanently. This Court's review is warranted.

A. Acting Officers Directed To Serve By The President Under Subsections (a)(2) and (a)(3) of 5 U.S.C. 3345 Who Have Not Served As First Assistants Are Not Barred From Continued Service Upon Being Nominated

The court of appeals concluded that the restriction in Subsection (b) of 5 U.S.C. 3345—which bars a presidential nominee from acting in a vacant position unless the individual served as first assistant for 90 days or more in the year preceding the vacancy or was con-

firmed by the Senate as the first assistant—applies to *all* individuals serving in an acting capacity under the Act, not just first assistants serving under Subsection (a)(1). That interpretation is contrary to the Act's text, structure, objectives, and history, as well as the unbroken practice since the FVRA's enactment.

1. The FVRA's text and structure support the Executive Branch's longstanding interpretation.

a. The limitations set forth in Subsection (b)(1) are most naturally read as constraining acting service by first assistants pursuant to Subsection (a)(1), not acting service by Senate-confirmed officers or senior agency employees designated by the President pursuant to Subsections (a)(2) and (a)(3). Subsection (a) provides three mechanisms for temporarily filling a vacant PAS office. Subsection (a)(1) sets forth the general rule that the first assistant "shall perform the functions and duties of the [vacant] office temporarily in an acting capacity," subject to certain time limits. 5 U.S.C. 3345(a)(1). Subsections (a)(2) and (a)(3) then authorize the President to create exceptions to that general rule of automatic accession by designating another official instead. Subsection (a)(2) provides that "notwithstanding paragraph (1)," the President may direct an officer who holds another PAS office to perform the functions and duties of the vacant office temporarily in an acting capacity. 5 U.S.C. 3345(a)(2). And Subsection (a)(3) provides that "notwithstanding paragraph (1)," the President may direct an individual who has served in a senior position in the same agency for more than 90 days during the year preceding the vacancy to perform the functions and duties in an acting capacity. 5 U.S.C. 3345(a)(3).

The very next provision of the FVRA, Subsection (b)(1), sets out a limitation that also applies "[n]otwithstanding subsection (a)(1)"—namely, that a person nominated to fill the vacant office may not perform the functions and duties of that office on an acting basis if he did not serve in the position of first assistant to the office for at least 90 days during the year preceding the vacancy. 5 U.S.C. 3345(b)(1). That provision is most naturally read as another exception to the general rule in Subsection (a)(1) that the first assistant "shall perform" the functions and duties of the office. 5 U.S.C. 3345(a)(1). It thereby prevents the Executive Branch from circumventing the advice-and-consent process by bringing someone in from outside the government after a vacancy occurs, placing him immediately in a first-assistant position, and having him assume the duties of the office in an acting capacity and continue to do so even after he is nominated.

That interpretation is evident from the text of Subsection (b)(1) itself, both because it expressly refers to and overrides only "subsection (a)(1)," and because the restriction it imposes—90 days of service as first assistant during the year preceding the vacancy—itself speaks only of a "first assistant" and ordinarily would be satisfied only by a person who had already been the first assistant. The "[n]otwithstanding subsection (a)(1)" proviso in Subsection (b)(1) "set[s] out an order of operations," App., *infra*, 14a, dictating that the limitation in Subsection (b)(1) takes precedence over one of the three mechanisms for acting service set forth in one particular subsection of the FVRA—the mechanism for service by first assistants set forth in Subsection (a)(1). The directive that Sub-

section (b)(1) takes precedence over one of Subsection (a)'s three mechanisms for filling vacant positions strongly indicates that the provision does *not* override the remaining two mechanisms, which permit the President (and only the President) to "direct" individuals meeting specified criteria to "perform the functions and duties of the vacant office temporarily in an acting capacity." 5 U.S.C. 3345(a)(2) and (3). In other words, the directive that Subsection (b)(1) applies "[n]otwithstanding subsection (a)(1)" establishes that Subsection (b)(1) is an exception only to Subsection (a)(1), not an exception to Subsections (a)(2) and (a)(3) as well.

Indeed, if Congress had meant to subject all three mechanisms for designating a person to serve in an acting capacity to Subsection (b)(1)'s requirement of 90 days of prior service as first assistant, it could have straightforwardly provided that the limitations apply "[n]otwithstanding subsections (a)(1), (a)(2), and (a)(3)," or "[n]otwithstanding subsection (a)," which contains all three mechanisms. What Congress would not do if it wished to limit appointments under all three statutory subsections, however, is direct that the limitations applied "[n]otwithstanding" only *one* of the three statutory subsections—"subsection (a)(1)."

Adjoining provisions confirm this construction. On each occasion elsewhere in the FVRA in which Congress directed that a provision operate "notwithstanding" Subsection (a)(1), it used that directive to create an exception only to the automatic service by first assistants under Subsection (a)(1). Thus, Congress twice used the phrase "notwithstanding paragraph (1)" in Subsection (a) itself to establish that the President's power to designate a Senate-confirmed officer

or senior agency employee overrides the rule of automatic accession by the first assistant in Subsection (a)(1)—thereby constraining operation of Subsection (a)(1) alone. 5 U.S.C. 3345(a)(2) and (3). And Congress likewise used the "[n]otwithstanding subsection (a)(1)" formulation in Subsection (c) to override only the rule of automatic accession by the first assistant in Subsection (a)(1). Specifically, Congress provided in Subsection (c) that under particular circumstances, the President may direct a person who is nominated by the President for reappointment to an additional term in the same office to continue to serve in that office until the Senate acts on the nomination. 5 U.S.C. 3345(c)(1). The government's longstanding interpretation of Subsection (b)(1) gives the same meaning and function to the directly parallel "notwithstanding" clauses referring solely to Subsection (a)(1) in each of the four relevant subsections in which that phrase appears. The court of appeals' interpretation, in contrast, gives Subsection (b)(1)'s "[n]otwithstanding" clause a fundamentally different role from elsewhere in Section 3345.

b. The court of appeals' contrary reading is mistaken. The court sought to explain why Congress directed that Subsection (b)(1) supersede Subsection (a)(1), but did not make a similar directive with respect to Subsections (a)(2) and (a)(3), on the ground that Subsection (a)(1) provides that the first assistant "'shall' take over as acting officer" under the conditions set forth in that paragraph. App., *infra*, 14a. But that is no explanation. The word "shall" in Subsection (a)(1) is what makes the general rule of accession by the first assistant mandatory and automatic. 5 U.S.C. 3345(a)(1). Subsections (a)(2) and (a)(3) do not

use the word "shall" because their operation is not automatic, but rather is conditioned on the President choosing to invoke them. Once the President does so, however, those subsections are just as categorical as Subsection (a)(1) in unconditionally directing the specified officer to perform the office's functions and duties. Accordingly, Congress's "[n]otwithstanding subsection (a)(1)" directive in Subsection (b)(1) cannot be explained as a response to the differing phraseology of Subsections (a)(1), (a)(2), and (a)(3). If Congress had wanted to override the acting-service provisions in Subsections (a)(2) and (a)(3), by imposing the rule of 90 days of prior service as first assistant on nominees who did not even assume an acting capacity on that basis, Congress surely would have needed to direct that Subsection (b)(1)'s rule applies "notwithstanding" those provisions, as well as "[n]otwithstanding subsection (a)(1)."

The court of appeals also stated that Subsection (b)(1) must constrain service under all three paragraphs in Subsection (a) because Subsection (b)(1)'s reference to limits on "person[s]" serving under "this section" is "irreconcilable" with the Executive Branch's longstanding view of Subsection (b)(1) as imposing limits solely on first assistants. App., *infra*, 14a. The court erred in suggesting a conflict between that language and the government's reading. The first assistants described in Subsection (a)(1) to whom Subsection (b)(1) applies are, of course, "person[s]" who are serving under "this section"—5 U.S.C. 3345.[2] And

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[2] The specification that Subsection (b)(1) is relevant only to acting designations under Section 3345 does serve a limiting function. The FVRA provides that Section 3345 is not the exclusive mechanism for temporarily authorizing acting service, by stating that

because Subsection (b)(1) already indicates that it limits only first assistants serving under Subsection (a)(1) by specifying that it applies "[n]otwithstanding subsection (a)(1)"—rather than "[n]otwithstanding subsection (a)" or "[n]otwithstanding subsections (a)(1), (a)(2), and (a)(3)"—there was no need for Congress to reiterate, using the court's preferred formulations, that the affected persons were only those who are first assistants serving under Subsection (a)(1).[3]

Finally, the court of appeals suggested that the Executive Branch's longstanding construction should be rejected because the Executive Branch's reading—"but not [respondent's]—renders other provisions of section 3345 superfluous." App., *infra*, 15a. The court reasoned that if Subsection (b)(1) were limited to first assistants, it would be superfluous for the exception to Subsection (b)(1) set out in Subsection (b)(2) to be made expressly applicable to a person who "is serving" as first assistant. *Id.* at 16a. But Subsection (b)(1) imposes a restriction on the basis of the brevity

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acting service is also valid if allowed under a different express statutory authorization meeting certain criteria. See 5 U.S.C. 3347(a). By specifying that the limits in Subsection (b)(1) apply only to acting service under Section 3345, Subsection (b)(1) clarifies that it does not apply to non-FVRA designations made under other statutory provisions.

[3] Tellingly, the committee-reported version of the FVRA used the same phrases—"person" and "under this section"—in a version of the provision that unambiguously applied only to first assistants. See S. Rep. No. 250, 105th Cong., 2d Sess. 25 (1998); see also pp. 23-25, *infra*. Because the "person" and "under this section" language was thus simply carried over from a version that plainly covered only first assistants, the court of appeals erred in concluding that those phrases demonstrate that Congress intended to reach a broader group than first assistants.

of a person's *past* service as first assistant, while the exception to that restriction in Subsection (b)(2) is based on the person's *current* service as a *Senate-confirmed* first assistant. Given that contrast, it is understandable that Congress would restate with completeness the criteria for Subsection (b)(2) to apply, and clarify that it applies only to currently-serving, Senate-confirmed first assistants. That structure simply serves to make the restriction in Subsection (b) (including the exception to that restriction in paragraph (2)) entirely self-contained in its treatment of first assistants serving in an acting capacity who are also nominees.[4] In sum, when the language of Subsection (b) and Section 3345's other provisions are read together, with attention to the uniform meaning and function of the directly parallel "notwithstanding" phrase in four of its subsections, the government's interpretation is on far firmer textual and structural ground than respondent's.

2. Respondent's reading of the FVRA, unlike the government's, also results in disparities in treatment among the statute's classes of acting officials that do not align with the statute's objectives.

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[4] The court of appeals also stated that the government's interpretation could create superfluity with regard to 5 U.S.C. 3345(b)(1)(A)(i), which triggers Subsection (b)(1)'s prohibition when the acting officer "did not serve in the position of first assistant" in the year preceding the vacancy. App., *infra*, 16a. The court acknowledged, however, that this provision is not superfluous if Subsection (a)(1) authorizes service by individuals who became the first assistant after the vacancy arose. *Ibid.* That is the government's understanding of Subsection (a)(1). See Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 179-181 (2001).

The FVRA was enacted following appointment controversies in which a number of Senators expressed the view that Presidents were circumventing the advice-and-consent process by placing controversial nominees in non-PAS posts and then designating them to fill PAS positions in an acting capacity, without those nominees' ever being confirmed by the Senate. See, *e.g.*, 144 Cong. Rec. 12,432 (June 16, 1998) (statement of Sen. Thompson); *id.* at 12,434 (statement of Sen. Thurmond). That concern came to the foreground in 1997, after the Senate returned the nomination of a candidate from outside government service to be the Assistant Attorney General for the Civil Rights Division of the Department of Justice. Following the Senate's return of the nomination, the Attorney General appointed the same candidate to occupy the position of first assistant to the same vacant office, and authorized the newly-minted first assistant to perform the duties of the vacant PAS office on an acting basis. Some Senators charged that these actions circumvented the Senate's advice-and-consent function, and sought legislation to prevent a recurrence. See *id.* at 12,434 (statement of Sen. Thurmond); 144 Cong. Rec. 22,507-22,508 (Sept. 28, 1998) (statement of Sen. Thompson); see also Morton Rosenberg, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* 1 (1998); Memorandum from Morton Rosenberg, Specialist in Am. Law, *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* 1-4 (Jan. 14, 1998) (exhibit to *Oversight of the Implementation of the Vacancies Act: Hearing Before the Senate Comm. on Governmental Affairs*, 105th Cong., 2d Sess. 62-100 (1998)).

The FVRA, which was enacted the year after this controversy, balanced the objective of preventing such perceived circumvention with ensuring effective execution of high-level government offices during vacancies. Thus, when a President determines that a first assistant is the person most capable of filling an office both temporarily and permanently, Congress did not generally require the President to choose between the two. Instead of disqualifying every first assistant from filling a PAS office in an acting capacity if nominated, Congress barred such service only in circumstances where concerns about circumvention of the Senate and manipulation are most acute. In particular, the requirement that a first assistant have served as such for 90 days in the year before the vacancy in order to serve as both acting PAS officer and nominee, 5 U.S.C. 3345(b)(1), substantially reduces the potential for circumvention of the advice-and-consent process, by ensuring that a chosen nominee cannot simply be placed in a first-assistant position when a vacancy occurs. See S. Rep. No. 250, 105th Cong., 2d Sess. 13 (1998) (Senate Report) ("The Committee believes that the length of service of the first assistant eligible to be both the nominee and the acting officer should be sufficiently long to prevent manipulation of first assistants to include persons highly unlikely to be career officials."). And by providing that first assistants may serve as both acting officers and nominees without satisfying the 90-days-of-prior-service test when those first assistants were themselves presidentially appointed and Senate-confirmed, Congress allowed for the continued service of recent first-assistant appointees whose selection as acting officers

is especially unlikely to be an attempt at Senate circumvention. 5 U.S.C. 3345(b)(2).

Respondent's reading of the FVRA, by contrast, would introduce distinctions among acting officers that are unsupported by consideration of this history or of the statute's structure. Congress had no reason to extend beyond Subsection (a)(1) the limits in Subsection (b)(1) that prevent use of eleventh-hour first-assistant appointments to circumvent Senate review. That is because Subsections (a)(2) and (a)(3) contain their own corresponding limitations tailored to the presidential designation authority in those paragraphs. Individuals directed to serve as acting officers under Subsection (a)(2) *already* occupy Senate-confirmed positions, and are therefore unlikely to have been directed to perform the functions of the vacant PAS office in an attempt to circumvent the Senate's advice-and-consent role. In that respect, they are like the Senate-confirmed *first assistants* who are allowed to serve as acting PAS officers by virtue of Subsection (b)(2), without satisfying the requirement of 90 days' service as first assistant prior to the vacancy. And individuals in senior agency positions directed to serve as acting officers under Subsection (a)(3) *already* must have been serving in their senior agency positions for at least 90 days during the year preceding occurrence of the vacancy—thereby satisfying a 90-day-minimum-service requirement that is directly parallel to the one that Subsection (b)(1) imposes on first assistants to avoid circumvention through eleventh-hour appointments. In short, Subsections (a)(2) and (a)(3) already subject the other categories of acting officers to safeguards against

circumvention that correspond to those that Subsections (b)(1) and (b)(2) provide for first assistants.

The Executive Branch's longstanding interpretation thus provides the same treatment for officers and employees who are similarly situated in terms of the policy concerns underlying Subsection (b)(1). The court of appeals' approach, in contrast, introduces disparities between the treatment of classes of acting officials that the court did not even seek to justify. For instance, it renders virtually all officers already serving in *Senate-confirmed* offices ineligible to fill vacant PAS offices in an acting capacity following their nominations, regardless of their length of service, even though a *non-Senate-confirmed* first assistant can serve and also be the nominee as long as he occupied his position for at least 90 days before the vacancy arose. There is no indication that Congress intended to bar acting service by officers who meet Senate-confirmation or longevity-of-service requirements analogous to those constraining acting service by first assistants. And such a construction would undermine effective government operations by routinely requiring that acting officers with deep agency ties give up their acting responsibilities if nominated.

The Executive Branch's interpretation has been in place since the FVRA's enactment and has been applied to numerous acting designations and nominations in the intervening years. As far as the government is aware, that interpretation never prompted objection from the Senate prior to the issuance of the decision below.[5] Nor has Congress amended the

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[5] Following the decision below, several Senators have called into question the service of acting nominees in light of that decision. See p. 28-29, *infra*.

FVRA to foreclose it. On the contrary, across three Administrations, the Senate has regularly confirmed nominees who continued serving as acting PAS officers under Subsection (a)(2) or (a)(3) following nomination, even though such officers had not previously served as first assistants. The lack of recorded Senate objection, in a setting in which Congress has shown considerable vigilance in protecting its constitutional prerogatives, adds substantial weight to the Executive Branch's interpretation. That is especially so since the General Accounting Office, an instrumentality of Congress, agreed with the Executive Branch's interpretation in 2001. See Joyner 3-4.

3. Finally, the Executive Branch's interpretation is strongly supported by the FVRA's legislative history. The version of Section 3345 voted out of the Senate Committee contained provisions parallel to Subsections (a)(1) and (a)(2) for first assistants automatically to perform the functions and duties of a vacant PAS office, and in the alternative for the President to direct a PAS officer to do so, but it did not authorize the President to direct individuals serving in senior agency positions to serve as acting officers (as Subsection (a)(3) as enacted does). As the court of appeals acknowledged, the reported bill's limitation in Subsection (b) on service during the pendency of a nomination clearly applied only to first assistants, although it would have required 180 days of service as first assistant rather than the 90 days required by Subsection (b)(1) as finally enacted. See Senate Report 25.

That version engendered objections from numerous Senators who felt the bill did not give the President sufficient flexibility. See Senate Report 31. They urged two changes relevant here: one to add a cate-

gory of acting officers similar to that in Subsection (a)(3) as enacted, and the other to shorten "the length of service requirement for first assistants who are nominees." *Ibid.* Senators echoed those concerns during floor debates, and they successfully urged the Senate to defeat cloture so that flexibility-enhancing amendments could be offered. See 144 Cong. Rec. at 22,512-22,514 (statement of Sen. Levin); *id.* at 22,515-22,518 (statement of Sen. Durbin); *id.* at 22,519-22,520 (statement of Sen. Glenn); *id.* at 22,524-22,525 (statement of Sen. Lieberman); *id.* at 22,526.

As finally enacted, Section 3345 included several amendments, in response to the concerns and proposals of those Senators, to enhance the flexibility of the statute. Those amendments (i) created the new Subsection (a)(3) category of persons who can be directed to serve in an acting capacity if they have served in senior agency positions for 90 days in the year prior to the occurrence of the vacancy, and (ii) reduced the time-in-service requirement in Subsection (b) for first assistants who are nominees to 90 days from 180 days. Senate Report 13. It makes little sense to think that those flexibility-enhancing amendments expanded the *restriction* in Subsection (b)(1) on serving as an acting officer after being nominated, so that the restriction would apply not only to first assistants, but also to persons designated by the President pursuant to Subsections (a)(2) and (a)(3).

The explanation in the Senate of the language ultimately enacted confirms that they did not. After the bill was reported by the Senate Committee, Senator Thompson, the chairman of the committee and sponsor of the bill, submitted an amendment that would have revised Subsection (b) to read essentially as it

was finally enacted, reducing the length-in-service requirement from 180 days to 90 days. 144 Cong. Rec. 22,015 (Sept. 25, 1988). During the debate on cloture, Senator Glenn stated that he intended to offer amendments to add essentially what became Subsection (a)(3) and to "further decrease" the time-in-service requirement "for a first assistant who will be an acting officer and the nominee to 45 days." 144 Cong. Rec. at 22,519.

Afterward, the cloture vote failed, and the FVRA ultimately was enacted as part of broader legislation. In identifying the changes made to the committee bill as it was added to the broader legislation, Senator Thompson explained that the 180-day period in Subsection (b) "governing the length of service prior to the onset of the vacancy that the *first assistant* must satisfy" was reduced from 180 days to 90 days. 144 Cong. Rec. 27,496 (Oct. 21, 1998) (emphasis added). This was an obvious compromise between the 180-day-time-in-service requirement in the committee bill that was expressly limited to persons who were first assistants and nominees, and the 45-day requirement Senator Glenn proposed, also expressly for "first assistants." Senate Report 25; 144 Cong. Rec. at 22,519. And Senator Thompson expressly declared that "the revised reference to § 3345(a)(1)" in Subsection (b)(1) "means that this subsection applies *only* when the acting officer is the first assistant, *and not when the acting officer is designated by the President pursuant to §§3345(a)(2) or 3345(a)(3).*" 144 Cong. Rec. 27,496 (emphasis added). That is exactly the Executive Branch's longstanding interpretation, and the one that

multiple Presidents have repeatedly acted upon since the FVRA was enacted.[6]

B. This Case Presents An Important Question Warranting Immediate Review By This Court

The court of appeals' decision is not only wrong and contrary to settled interpretation and practice, but the court's interpretation of the FVRA also significantly curbs the President's appointment authority. This case therefore presents a question of exceptional importance that warrants this Court's review. That review is especially appropriate because of the practical uncertainty the decision generates regarding service of high-level government officers, because the D.C. Circuit's broad jurisdiction may be invoked by future litigants to subject most agency actions to its ruling, and because the question should be settled to remove uncertainty regarding the interaction of the President's powers of appointment and designation for the benefit of the next Administration.

1. The question presented is one of exceptional importance. The selection of individuals to fill high-level posts in the Executive Branch implicates core powers

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[6] Senator Thompson's explanation, and Senator Glenn's identical understanding, are not undermined by a passing statement of Senator Byrd that "a person may not serve as an acting officer if: (1)(a) he is not the first assistant, or (b) he has been the first assistant for less than 90 of the past 365 days, and has not been confirmed for the position; and (2), the President nominates him to fill the vacant office." 144 Cong. Rec. at 27,498; see App., *infra*, 17a-18a. Senator Byrd was not the author of the language he was addressing, and his passing statement is accordingly entitled to far less weight. That is all the more true given its obvious tension with the origins and flexibility-enhancing purpose of the change to Subsection (b)(1) discussed above.

of the President that are vital to the operation of the federal government. The rationale of the decision below substantially alters the President's authority in that area. Previously, when the President determined that the individual best qualified to perform the functions and duties of a vacant PAS office was another PAS officer or a senior agency employee, he could direct that individual to fill the vacant office in an acting capacity while also nominating him for the office. Under the court of appeals' analysis, however, the President must either choose someone else as the acting officer; choose someone else as the nominee; or have the acting officer give up the functions and duties of the office when he is nominated, with the attendant disruption to the agency caused by yet another temporary change in leadership.

On a practical level, because the decision below rejects the Executive Branch's interpretation of the FVRA dating to almost immediately after the statute's passage, the decision below calls into question high-level actions in the Executive Branch under three different Presidents. Decisions of many former acting officers, including senior officers in the HHS Centers for Medicare and Medicaid Services, DOJ, DOT, Department of Defense, the Export-Import Bank, and General Services Administration, could be open to question under the court of appeals' reasoning. Moreover, the decision below casts a cloud over the service of about half a dozen current acting high-level officers, including in the DOT, HHS, EPA, and OPM.

The impact of the decision below is heightened because of the stringent consequences that the FVRA imposes when an improperly-serving acting officer

undertakes functions and duties that are tied by statute or regulation exclusively to that particular PAS post. 5 U.S.C. 3348(a)(2). Subject to exceptions for only a few positions, the FVRA provides that if the FVRA disallows an individual's service in an acting capacity, actions taken by that individual "in the performance of any function or duty of [the] vacant office * * * have no force and effect" and "may not be ratified." 5 U.S.C. 3348(d).[7] The court of appeals' decision thus casts a cloud over many past decisions by top government officials.

Events of recent months demonstrate the potential for uncertainty and confusion created by the decision below concerning the service of key government officials. The Chairman of the Senate Armed Services Committee cited the decision in a letter declining to hold a confirmation hearing on the President's nominees for Secretary of the Army and Under Secretary of Defense for Personnel and Readiness while those individuals were serving in those offices in an acting capacity. Letter from John McCain, Chairman, U.S. Senate Comm. on Armed Servs., to Barack Obama, U.S. President (Nov. 30, 2015) (on file with the Office of Solicitor General); see Sydney J. Freedberg, Jr., *McCain Forces Fanning to Step Aside as Acting Army Secretary*, Breaking Def. (Jan. 11, 2016), http://breakingdefense.com/2016/01/mccain-forces-fanning-to-step-aside-as-acting-army-secretary/. In March 2016, the Chairman of the Senate's Environment and

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[7] There is an exception allowing ratification of the actions of NLRB's General Counsel. See 5 U.S.C. 3348(e)(1); App., *infra*, 21a-22a. That narrow exception in no way undermines the need for review of the question presented, which has Executive-Branch-wide significance.

Public Works Committee sent a letter to the EPA that cited the court of appeals decision as a basis for questioning the continued service of the agency's Acting Deputy Administrator. Letter from James M. Inhofe, Chairman, U.S. Senate Comm. on Env't & Pub. Works, to Gina McCarthy, Adm'r, EPA (Mar. 8, 2016), http://www.epw.senate.gov/public/_cache/files/0da0f6d1 1eed-43f5-aa11-9dec604fa31d/meiburg-030816-letter-to-epa.pdf; see also Memorandum from Patrick E. McFarland, OPM Inspector Gen., to Beth F. Cobert, Acting Dir., *Violation of the Federal Vacancies Reform Act* (Feb. 10, 2016), https://www.opm.gov/our-inspector-general/special-reports-and-reviews/violation-of-the-federal-vacancies-reform-act.pdf (citing the decision below and opining, contrary to the Executive Branch's position, that the current Acting Director of OPM cannot validly serve in that role under the court's decision). This Court's intervention is necessary to eliminate uncertainty concerning high-level government service, and to definitively resolve the construction of a provision that involves core statutory and constitutional powers of the Executive.

2. Certiorari is particularly warranted due to the D.C. Circuit's broad jurisdiction over agency actions. The court below appears to have been the first appellate court to construe the instant FVRA provision. Since then, one other court has considered the provision's meaning, and agreed with the view of the panel below, in the context of another challenge to actions by Solomon during his service as Acting General Counsel of the NLRB. *Hooks* v. *Kitsap Tenant Support Servs., Inc.*, No. 13-35912, 2016 WL 860335, at *1

(9th Cir. Mar. 7, 2016).[8] Because of the D.C. Circuit's exceptionally broad jurisdiction over administrative actions, however, if this Court declines to grant review in this case, future litigants seeking to challenge agency actions under the FVRA would be likely to bring suit in the District of Columbia. See, *e.g.*, 28 U.S.C. 1391(e)(1)(A). Accordingly, if the decision below goes unreviewed, it is likely as a practical matter to operate as a substantial constraint on the President's selection of nominees and acting officials. This Court should accordingly grant a writ of certiorari now, to resolve this question of exceptional importance.

3. Finally, this Court's review is particularly appropriate because of the change of Administrations that will occur in January 2017. As Administrations change, PAS officers leave government service, and it is common for agencies to be staffed by a large number of acting officers until the new President's nominees have been able to gain confirmation. This Court

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[8] In pending cases in three other circuits, litigants have sought to challenge actions of Solomon during his service as Acting General Counsel of the NLRB on grounds similar to those raised here. See *NLRB* v. *Pier Sixty, LLC*, No. 15-1841 (2d Cir.); *1621 Route 22 W. Operating Co.* v. *NLRB*, No. 15-2466 (3d Cir.); *Ohio Edison Co.* v. *NLRB*, No. 15-1783 (6th Cir.). However, none of those litigants raised their claims before the Board. Accordingly, NLRB has argued that those litigants forfeited their FVRA challenges—an argument that would make it unnecessary for those courts of appeals to ever reach the question presented here. Cf. App., *infra*, 30a (explaining that court "address[ed] the FVRA objection in this case because [respondent] raised the issue in its exceptions to the ALJ decision as a defense to an ongoing enforcement proceeding" and noting that it "doubt[ed] that an employer that failed to timely raise an FVRA objection—regardless whether enforcement proceedings are ongoing or concluded—will enjoy the same success").

should grant review to ensure that the new President will not face uncertainty during that transitional time regarding the legal constraints that govern his or her selection of acting officers and nominees.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 14-1107, 14-1121

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Argued: Mar. 10, 2015
Decided: Aug. 7, 2015

Before: HENDERSON, SRINIVASAN and WILKINS, Circuit Judges.

Opinion for the Court filed by Circuit Judge HENDERSON.

KAREN LECRAFT HENDERSON, Circuit Judge:

This case involves a labor dispute between an ambulance company and its employees. We do not reach the merits of that dispute, however, because we conclude that Lafe Solomon, the former Acting General Counsel of the National Labor Relations Board (NLRB or Board), served in violation of the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. §§ 3345 *et seq.* Accordingly, the unfair labor practice (ULP) complaint issued against the ambulance company was unauthorized. We grant

the petition for review, deny the cross-application for enforcement and vacate the Board's order.

I. BACKGROUND

A. VACANCY STATUTES

The FVRA is a response to what Chief Justice John Marshall called "the various crises of human affairs"—problems that arise when our Constitution confronts the realities of practical governance. *M'Culloch v. Maryland*, 17 U.S. 316, 415, 4 Wheat. 316, 4 L. Ed. 579 (1819). Specifically, the Appointments Clause generally requires "Officers of the United States" to be nominated by the President "by and with the Advice and Consent of the Senate." U.S. CONST. art. II, § 2, cl. 2. Advice and consent is "more than a matter of etiquette or protocol"; it is a "structural safeguard[ ]" intended to "curb Executive abuses of the appointment power" and to "promote a judicious choice of persons for filling the offices of the union." *Edmond v. United States*, 520 U.S. 651, 659, 117 S. Ct. 1573, 137 L. Ed. 2d 917 (1997) (quotation marks and alterations omitted). But vacancies can occur unexpectedly (due to death, resignation, illness, etc.) and the confirmation process takes time. *See* ANNE JOSEPH O'CONNELL, WAITING FOR LEADERSHIP at 10 fig. 5 (2010) (finding average lag time of 190 days between vacancy and confirmation). To keep the federal bureaucracy humming, the President needs the power to appoint acting officers who can serve on a temporary basis without first obtaining the Senate's blessing.

Since the "beginning of the nation," the Congress has given the President this power through vacancy statutes. *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervi-*

sion, 139 F.3d 203, 209-10 (D.C. Cir. 1998) (citing, *inter alia*, Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281).[1] The predecessor to the FVRA, the Vacancies Act, was first enacted in 1868. *See* Act of July 23, 1868, ch. 227, 15 Stat. 168. The Vacancies Act allowed the President to fill vacancies with temporary acting officers, subject to limitations on whom he could appoint and how long the appointee could serve. *See* Pub. L. No. 89-554, 80 Stat. 378, 426 (Sept. 6, 1966); Pub. L. No. 100-398, 102 Stat. 985, 988 (Aug. 17, 1988).

Presidents, however, have not always complied with the Vacancies Act. *See* MORTON ROSENBERG, CONG. RESEARCH SERV., 98-892 A, THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE'S CONFIRMATION PREROGATIVE 2-3 (1998). By 1998, an estimated 20% of all officers in positions requiring presidential nomination and Senate confirmation (PAS positions) were serving in a temporary acting capacity, many well beyond the time limits prescribed in the Vacancies Act. *See id.* at 1. Nor was the Vacancies Act particularly amenable to judicial enforcement. In *Doolin*, for example, we did not decide whether the acting director of the Office of Thrift Supervision lacked statutory authority because we determined that any error in his appointment was cured. *See* 139 F.3d at 214. We relied on the doctrine of ratification: because the director's decision was later approved by a properly appointed

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[1] The Constitution also partially addresses this problem. The President can temporarily fill vacancies "that may happen during the Recess of the Senate." U.S. CONST. art. II, § 2, cl. 3. But the Recess Appointments Clause is an incomplete answer because the President may need to install an acting officer *before* the Senate's next recess.

director, any defect in his appointment was immaterial. *See id.* at 212-14. Our decision in *Doolin*, along with the President's appointment of Bill Lann Lee to be Acting Attorney General of Civil Rights in 1997, prompted congressional action. *See* ROSENBERG, *supra*, at 1, 8.

In June 1998, Senators Fred Thompson, Robert Byrd, Strom Thurmond and others introduced the FVRA to strengthen, and ultimately replace, the Vacancies Act. *See* 144 CONG. REC. S6413-14 (daily ed. June 16, 1998) (statement of Sen. Thompson). The statute was framed as a reclamation of the Congress's Appointments Clause power. *See id.* at S6413 ("This legislation is needed to preserve one of the Senate's most important powers: the duty to advise and consent on presidential nominees."); S. REP. NO. 105-250, at 5 (1998) ("If the Constitution's separation of powers is to be maintained, ... legislation to address the deficiencies in the operation of the current Vacancies Act is necessary. ... [T]he Senate's confirmation power is being undermined as never before."). After some amendment, the FVRA was enacted in October 1998. *See* Pub. L. No. 105-277, div. C, tit. I, § 151.

The FVRA provides that, in the event of a vacancy in a PAS position, the "first assistant" automatically takes over in an acting capacity. 5 U.S.C. § 3345(a)(1). The President can also choose to appoint a senior employee from the same agency or a PAS officer from another agency to serve as the acting officer. *Id.* § 3345(a)(3), (a)(2). Generally speaking, an acting officer can serve no longer than 210 days and cannot become the permanent nominee for the position. *See id.* §§ 3346; 3345(b). Moreover, in response to *Doolin*, the FVRA renders actions taken by persons serving in violation of the Act void ab initio. *See id.* § 3348(d)(1)-(2) ("An action taken by

any person who is not acting [in compliance with the FVRA] shall have no force or effect" and "may not be ratified."); *see also* 144 CONG. REC. S6414 (explaining that the FVRA "impose[s] a sanction for noncompliance," thereby "[o]verruling several portions of [*Doolin*]"); S. REP. NO. 105-250, at 5 ("The Committee . . . finds that th[e ratification] portion of [*Doolin*] demands legislative response. . . . ").

B. NLRB GENERAL COUNSEL VACANCY

Under the National Labor Relations Act (NLRA), the General Counsel of the NLRB must be appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 153(d). He is primarily responsible for prosecuting ULP cases before the Board. *Id.* Indeed, the Board cannot adjudicate a ULP dispute until the General Counsel decides a charge has merit and issues a formal complaint. *See id.* § 160(b); 29 C.F.R. §§ 102.9, 102.15. To manage the volume of ULP charges filed each year, the General Counsel has delegated his authority to investigate charges and issue complaints to thirty-two regional directors. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 139, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975) (citing 29 C.F.R. §§ 101.8; 102.10). The General Counsel, however, retains "final authority" over charges and complaints and exercises "general supervision" of the regional directors. 29 U.S.C. § 153(d).

In June 2010, Ronald Meisburg resigned as NLRB General Counsel. The President directed Lafe Solomon, then—Director of the NLRB's Office of Representation Appeals, to serve as the Acting General Counsel in Meisburg's stead. *See* Memorandum from the White House for Lafe E. Solomon (June 18, 2010). The President cited the FVRA as the authority for Solomon's appointment.

See id. (invoking "section 3345(a) of title 5").[2] On January 5, 2011—six months into Solomon's temporary appointment—the President nominated him to be General Counsel. 157 CONG. REC. S69 (daily ed. Jan. 5, 2011). The Senate, however, returned Solomon's nomination. 159 CONG. REC. S17 (daily ed. Jan. 3, 2013). The President resubmitted Solomon's nomination on May 24, 2013, 159 CONG. REC. S3884 (daily ed. May 23, 2013), but ultimately withdrew it and nominated Richard Griffin instead, who was confirmed by the Senate on October 29, 2013. 159 CONG. REC. S7635 (daily ed. Oct. 29, 2013). All told, Solomon served as Acting General Counsel from June 21, 2010 to November 4, 2013.

C. BOARD PROCEEDINGS AGAINST SOUTHWEST

SW General, Inc. (Southwest) provides ambulance services to hospitals in Arizona. Its emergency medical technicians, nurses and paramedics are represented by the International Association of Fire Fighters Local I-60, AFL-CIO (Union). The most recent collective bargaining agreement between Southwest and the Union contained a "Longevity Pay" provision, guaranteeing annual bonuses to Southwest employees who had been with the company for at least ten years. In December 2012—after the collective bargaining agreement expired but

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[2] The NLRA also authorizes the appointment of a temporary Acting General Counsel. *See* 29 U.S.C. § 153(d); *see also* S. REP NO. 105-120, at 16 (FVRA does not override appointment provision in NLRA (referencing 5 U.S.C. § 3347(a)(1)(A))). The President did not invoke the NLRA when appointing Solomon, however—perhaps because the FVRA allows an acting officer to serve for a longer period of time. *Compare* 29 U.S.C. § 153(d) (permitting service for 40 days, tolled while nomination is pending before Senate), *with* 5 U.S.C. § 3346 (permitting service for 210 days, tolled while first or second nomination is pending before Senate).

before the parties negotiated a replacement—Southwest stopped paying the longevity bonuses.

The Union immediately filed a ULP charge with the NLRB. Regional Director Cornele Overstreet issued a formal complaint on January 31, 2013, alleging that Southwest had unilaterally discontinued longevity payments in violation of sections 8(a)(1) and 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(1), (5). After a hearing, an administrative law judge (ALJ) agreed that Southwest had committed a ULP. Southwest filed fifteen exceptions to the ALJ's decision, the second of which challenged the ULP complaint on the ground that Acting General Counsel Solomon was serving in violation of the FVRA. *See* Resp't's Exceptions to ALJ Decision at 1 ¶ 2, No. 28-CA-094176 (Sept. 5, 2013). In May 2014, the NLRB adopted the ALJ's recommended order with only minor modifications, *see* 360 N.L.R.B. No. 109 (2014), and it did not address Southwest's FVRA challenge.

Southwest petitioned this Court for review and the Board cross-petitioned for enforcement. We have jurisdiction pursuant to 29 U.S.C. § 160(f), (e).

II. ANALYSIS

Southwest maintains that, as of January 2011, Acting General Counsel Solomon was serving in violation of the FVRA and, thus, the ULP complaint issued against it in January 2013 was invalid. Specifically, Southwest argues that Solomon became ineligible to serve as Acting General Counsel once the President nominated him to be General Counsel. *See* 5 U.S.C. § 3345(b)(1).[3] In its

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[3] We note that Solomon's nomination was no longer pending when the ULP complaint issued against Southwest: the Senate had returned it and the President had not yet resubmitted it. The

original brief, the Board vigorously contested Southwest's reading of the statute but made no argument—except in a lone footnote—about the *consequences* of an FVRA violation. We therefore asked the parties to submit supplemental briefs addressing whether an FVRA violation, assuming one occurred, would nonetheless be harmless error. With the benefit of the parties' arguments, we now conclude that (A) Solomon was serving in violation of the FVRA when the complaint issued against Southwest and (B) the violation requires us to vacate the Board's order.

A.

The key provision of the FVRA, for present purposes, is section 3345. For ease of reference, we quote the provision in full:

§ 3345. Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

Board, however, does not argue that the non-pendency of Solomon's nomination should make a difference in our analysis. We therefore assume it does not.

We also note that the complaint against Southwest was issued by Regional Director Overstreet pursuant to a *delegation* of authority from Solomon. The Board, however, does not argue that this delegation survives any defect in the General Counsel's authority. We, again, assume *arguendo* that it does not.

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of

> a term of office is an inability to perform the functions and duties of such office.

5 U.S.C. § 3345.

Solomon became Acting General Counsel pursuant to subsection (a)(3)—the senior agency employee provision. As the Director of the Office of Representation Appeals for the previous ten years, Solomon easily met the salary and experience requirements of that subsection. *See id.* § 3345(a)(3)(A)-(B). According to Southwest, however, Solomon could no longer serve as Acting General Counsel once the President nominated him in January 2011 to be General Counsel. Subsection (b)(1) of the FVRA prohibits a person from being both the acting officer and the permanent nominee unless (1) he served as the first assistant to the office in question for at least 90 of the last 365 days or (2) he was confirmed by the Senate to be the first assistant. *See id.* § 3345(b)(1)-(2). Solomon was never a first assistant *at all* so the exceptions plainly do not apply to him. The Board, however, contends that the prohibition in subsection (b)(1) governs only an acting officer who assumes the position pursuant to subsection (a)(1), not an acting officer who is directed to serve by the President pursuant to subsections (a)(2) or (a)(3). Thus, the pivotal question is whether the prohibition in subsection (b)(1) applies to *all* acting officers, as Southwest contends, or just first assistants who become acting officers by virtue of subsection (a)(1), as the Board contends. Considering this question de novo,[4] we think Southwest has the better argument.[5]

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[4] The NLRB is not entitled to *Chevron* deference when it interprets the FVRA, "a general statute not committed to [its] administration." *Soc. Sec. Admin. v. FLRA*, 201 F.3d 465, 471 (D.C. Cir.

The first independent clause of subsection (b)(1) is the clearest indication of its overall scope. That clause states that "*a person* may not serve as an acting officer for an office under *this section*." 5 U.S.C. § 3345(b)(1) (emphases added). The term "a person" is broad; it covers the full spectrum of possible candidates for acting officer. *See Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 312, 98 S. Ct. 584, 54 L. Ed. 2d 563 (1978) ("the phrase 'any person'" has a "naturally broad and inclusive meaning"). And the phrase "this section" plainly refers to section 3345 in its entirety. Throughout the FVRA, the Congress was precise in its use of internal cross-references. *See, e.g.*, 5 U.S.C. §§ 3345(b)(2)(A) ("subsection (a)"); 3345(c)(1) ("subsection (a)(1)"); 3345(c)(2) ("this section and sections 3346, 3347, 3348 . . "); 3345(a)(2)-(3) ("paragraph (1)"); 3348(e) ("this section"). If the Congress had wanted to enact the Board's understanding, it would have said "first assistant" and "that subsection"

2000). We also note that, in 1999, the Office of Legal Counsel (OLC) endorsed the NLRB's interpretation of subsection (b)(1). *See* Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 64 (1999) ("The limitation on the ability to be the nominee for the vacant position and to serve as the acting officer applies only to persons who serve as acting officers by virtue of having been the first assistant to the office."). But the OLC is not entitled to *Chevron* deference either. *See Crandon v. United States*, 494 U.S. 152, 177, 110 S. Ct. 997, 108 L. Ed. 2d 132 (1990) ("advisory opinion[ ] of the OLC is not an administrative interpretation that is entitled to deference under *Chevron* ").

[5] Our decision is in accord with the two other courts that have considered the question. *See Hooks v. Remington Lodging & Hospitality, LLC*, 8 F. Supp. 3d 1178, 1187-89 (D. Alaska 2014); *Hooks v. Kitsap Tenant Support Servs., Inc.*, No. 13-cv-5470, 2013 WL 4094344, at *2 (W.D. Wash. Aug. 13, 2013).

instead of "a person" and "this section." Thus, the plain language of subsection (b)(1) manifests that no person can serve as both the acting officer and the permanent nominee (unless one of the exceptions in subsections (b)(1)(A) or (b)(2) applies).

The Board's main argument to the contrary focuses on the first dependent clause in subsection (b)(1): "Notwithstanding subsection (a)(1)." According to the Board, the "notwithstanding" clause limits subsection (b)(1)'s prohibition to first assistants who become acting officers pursuant to subsection (a)(1). There are several flaws with this argument. For starters, it is not what the word "notwithstanding" means. *See Sandifer v. U.S. Steel Corp.*, — U.S. —, 134 S. Ct. 870, 876, 187 L. Ed. 2d 729 (2014) ("It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (quotation marks omitted)). "Notwithstanding" means "in spite of," OXFORD ENGLISH DICTIONARY (2d ed. 1989); BLACK'S LAW DICTIONARY (10th ed. 2014) —not, as the Board would have it, "for purposes of" or "with respect to." Here, then, the "notwithstanding" clause means "to the extent that subsection (a)(1) deviates from subsection (b)(1), subsection (b)(1) controls." *See United States v. Fernandez*, 887 F.2d 465, 468 (4th Cir. 1989) (proviso "'notwithstanding any other provision of law' . . . naturally means that the [statute] should not be limited by other statutes"); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 126 (Thompson/West 2012) ("A dependent phrase that begins with *notwithstanding* indicates that the main clause that it introduces . . . derogates from the provision to which it refers."). The Congress likely referenced subsection (a)(1) to clarify that its

command—that the first assistant "shall" take over as acting officer—does not supersede the prohibition in subsection (b)(1). But, apart from setting out an order of operations, the "notwithstanding" clause has no significance for the ultimate scope of subsection (b)(1). *See Kucana v. Holder*, 558 U.S. 233, 238-39 n.1, 130 S. Ct. 827, 175 L. Ed. 2d 694 (2010) ("The introductory clause ['Notwithstanding any other provision of law'] does not define the scope of [the statute]. It simply informs that once the scope of the [statute] is determined, [it applies] regardless of what any *other* provision or source of law might say.").

Context further refutes the Board's "notwithstanding" argument. As discussed, the Board's interpretation of "notwithstanding" is irreconcilable with the breadth of the words "a person" and "this section" in the remainder of the introductory clause. *See Maracich v. Spears*, — U.S. —, 133 S. Ct. 2191, 2205, 186 L. Ed. 2d 275 (2013) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."); *cf. also United States v. Emerson*, 270 F.3d 203, 233 n.32 (5th Cir. 2001) ("[W]here the preamble and the operative portion of the statute may reasonably be read consistently with each other, the preamble may not properly support a reading of the operative portion which would plainly be at odds with what otherwise would be its clear meaning."). Indeed, the only other time section 3345 uses the phrase "a person" is in subsection (a)(2) and, there, the phrase is plainly not limited to a first assistant. Moreover, the Congress used the word "notwithstanding" several times in section 3345. *See* 5 U.S.C. §§ 3345(a)(2)-(3) ("notwithstanding paragraph (1)"); 3345(c)(1) ("Notwithstanding subsection (a)(1)" and "notwithstanding adjournment sine die"). Each time, it plainly meant "in spite of" rather

than "with respect to." "It is a well established rule of statutory construction that a word is presumed to have the same meaning in all subsections of the same statute." *Allen v. CSX Transp., Inc.*, 22 F.3d 1180, 1182 (D.C. Cir. 1994) (quotation marks omitted). Similarly, the Congress used the phrase "For purposes of" in subsection (c)(2), which shows that it knew how to use limiting language when it wanted to. *See Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1240 (D.C. Cir. 2007) ("[W]e have repeatedly held that where different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings." (quotation marks and alteration omitted)). The Board's crabbed interpretation of "notwithstanding" simply does not pass muster.

Further, the Board's reading of subsection (b)(1)—but not Southwest's—renders other provisions of section 3345 superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (quotation marks omitted)). In the Board's view, subsection (b)(1) applies only to subsection (a)(1)—the first assistant provision. Although we do not decide its meaning today, subsection (a)(1) may refer to the person who is serving as first assistant *when the vacancy occurs*. *Accord* 23 Op. O.L.C. at 64 ("[W]e believe . . . you must be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant."). Under this reading, subsection (a)(1) provides a default rule that automatically promotes someone (the current first assistant) to be

the acting officer without a break in service and without action by the President. But if subsection (a)(1) refers to the first assistant at the time of the vacancy, then the condition in subsection (b)(1)(A)(i)—that the person "did not serve in the position of first assistant to the office" in the prior 365 days—is inoperative because the current first assistant *necessarily* served as the first assistant in the previous year. If Southwest is correct that subsection (b)(1) applies to all acting officers, however, then subsection (b)(1)(A)(i) is not superfluous because many PAS officers (subsection (a)(2)) and senior agency employees (subsection (a)(3)) will not have served as the first assistant in the prior year.

At oral argument, the Board argued—consistent with a revised OLC opinion—that subsection (a)(1) also applies to a person who becomes first assistant *after* the vacancy occurs. Oral Arg. Recording 17:02-30:24; *accord* Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 179-81 (2001). This interpretation, the Board contends, gives a nonsuperfluous meaning to subsection (b)(1)(A)(i). Yet, the Board's interpretation faces another surplusage problem. Section 3345(b)(2)(A) allows an acting officer to also be the permanent nominee if, *inter alia*, he "is serving as [a] first assistant." But the current first assistant—whether he became first assistant before or after the vacancy—is *necessarily* serving as a first assistant. The Board's interpretation (which reads "person" in subsection (b) to mean "first assistant") creates surplusage whereas Southwest's interpretation (which reads "person" to mean "first assistant, PAS officer or senior agency employee") does not.

Perhaps sensing the weakness of its textual arguments, the Board falls back on legislative history and statutory purpose to support its interpretation. Its argument needs to be quite strong because, to repeat, the text of the FVRA plainly supports Southwest. *See Milner v. Dep't of Navy*, 562 U.S. 562, 572, 131 S. Ct. 1259, 179 L. Ed. 2d 268 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language."); *Kloeckner v. Solis*, — U.S. —, 133 S. Ct. 596, 607 n.4, 184 L. Ed. 2d 433 (2012) ("[E]ven the most formidable argument concerning the statute's purposes could not overcome the clarity we find in the statute's text."). As we shall see, however, the Board's argument is anything but.

The Board first points to a floor statement by Senator Thompson, the chief sponsor of the FVRA. Thompson presaged the Board's view, stating, "Under § 3345(b)(1), the revised reference to § 3345(a)(1) means that this subsection applies only when the acting officer is the first assistant, and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3)." 144 CONG. REC. S12,822 (daily ed. Oct. 21, 1998). Yet, a statement of a single Senator—even the bill's sponsor—is only weak evidence of congressional intent. *See Zuber v. Allen*, 396 U.S. 168, 186, 90 S. Ct. 314, 24 L. Ed. 2d 345 (1969) ("Floor debates reflect at best the understanding of individual Congressmen."); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."). Moreover, Thompson was immediately contradicted by Senator Byrd—an "original sponsor" of the FVRA. 144

CONG. REC. S12,824 (statement of Sen. Byrd). Byrd's statement[6] hewed much more closely to the statutory text and suggested that subsection (b)(1) applies to all categories of acting officers. Thus, the floor statements are a wash. *See March v. United States*, 506 F.2d 1306, 1314 n.31 (D.C. Cir. 1974) ("[W]here, as here, [congressional debates] reflect individual interpretations that are contradictory and ambiguous, they carry no probative weight."). And Senator Thompson's statement is certainly not enough to overcome the FVRA's clear text. *See Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 12 (D.C. Cir. 2009) ("Floor statements from members of Congress, even from a bill's sponsors, cannot amend the clear and unambiguous language of a statute." (quotation marks omitted)).

The Board next cites a Senate committee report to buttress its interpretation. The report states that "a *first assistant* who has not received Senate confirmation, but who is nominated to fill the office permanently, can be made the acting officer only if he has been the first assistant for at least 180 days in the year preceding the vacancy." S. REP. NO. 105-250, at 2 (emphasis added). The committee report, however, is inapposite because it

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[6] "[T]he officer's position may be filled temporarily by either: (1) the first assistant to the vacant office; (2) an executive officer who has been confirmed by the Senate for his current position; or (3) a career civil servant, paid at or above the GS-15 rate, who has served in the agency for at least 90 of the past 365 days. However, *a person* may not serve as an acting officer if: (1)(a) *he is not the first assistant*, or (b) he has been the first assistant for less than 90 of the past 365 days, and has not been confirmed for the position; and (2), the President nominates him to fill the vacant office." 144 CONG. REC. S12,824 (emphases added).

discusses a *different version* of the FVRA from the one ultimately enacted. Specifically, an earlier draft of subsection (b) provided:

> (b) Notwithstanding section 3346(a)(2), a person may not serve as an acting officer for an office under this section, if—
>
> (1) on the date of the death, resignation, or beginning of inability to server of the applicable officer, such person serves *in the position of first assistant* to such officer;
>
> (2) during the 365-day period preceding such date, such person served *in the position of first assistant* to such officer for less than 180 days; and
>
> (3) the President submits a nomination of such person to the Senate for appointment to such office.

Id. at 25 (emphases added). This version of subsection (b) manifestly applies to first assistants only. But the version ultimately enacted looks quite different. In fact, the change in phraseology weighs somewhat *against* the Board's interpretation. *See Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1289 (D.C. Cir. 2000) ("The fact that Congress specifically rejected language favorable to [a party's] position and enacted instead language that is consistent with [the opponent's] interpretation only strengthens our conclusion that the [opponent] has correctly ascertained Congress' intent. . . . ").

Finally, the Board contends that Southwest's interpretation of subsection (b)(1) defeats the purpose behind subsections (a)(2) and (a)(3): namely, "expanding the pool of potential acting officers beyond first assistants." Resp't's Br. 38. But accepting Southwest's in-

terpretation in no way decreases the pool of people eligible to be an acting officer; it merely decreases the pool of people eligible to be both the acting officer *and* the permanent nominee.

In short, the text of subsection (b)(1) squarely supports Southwest's interpretation and neither the legislative history nor the purported goal of the FVRA helps the Board. We therefore hold that the prohibition in subsection (b)(1) applies to all acting officers, no matter whether they serve pursuant to subsection (a)(1), (a)(2) or (a)(3). Because Solomon was never a first assistant and the President nominated him to be General Counsel on January 5, 2011, the FVRA prohibited him from serving as Acting General Counsel from that date forward.

B.

Having concluded that Solomon was serving in violation of the FVRA when the ULP complaint issued against Southwest, we must now determine the consequence of that violation. Southwest believes we *must* vacate the Board's order. If the violation had occurred in the typical federal office, we might agree. The FVRA renders any action taken in violation of the statute void ab initio: section 3348(d) declares that "[a]n action taken by any person who is not acting [in compliance with the FVRA] shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d)(1)-(2). Moreover, without a valid complaint, the Board could not find Southwest liable for a ULP. *See* 29 U.S.C. § 160(b) (requiring complaints); *NLRB v. Dant*, 344 U.S. 375, 382, 73 S. Ct. 375, 97 L. Ed. 407 (1953) ("[T]he remedial processes of the [NLRA] to cure [unfair labor] practices . . . can only be invoked by the issuance of a complaint."); *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 325, 71 S. Ct. 758, 95 L. Ed. 969

(1951) ("The Board is a statutory agency, and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid.").

But this is not the typical case. Section 3348(e)(1) exempts "the General Counsel of the National Labor Relations Board" from the provisions of "section [3348]," including the void-ab-initio and no-ratification rules. *See* 5 U.S.C. § 3348(e)(1).[7] The Board contends that section 3348(e)(1) allows it to raise arguments like harmless error and the de facto officer doctrine. *See generally* 5 U.S.C. § 706 (in reviewing agency action, "due account shall be taken of the rule of prejudicial error"); *Doolin*, 139 F.3d at 212-14. We therefore assume that section 3348(e)(1) renders the actions of an improperly serving Acting General Counsel *voidable*, not void, and consider the two

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[7] According to a Senate committee report, section 3348(e) was intended to exempt the General Counsel of the NLRB from "the vacant office provisions" of the FVRA. S. REP. NO. 105-250, at 20. The vacant office provision is section 3348(b), which provides that, absent compliance with the FVRA, an office must "remain vacant" and "only the head of [the] Executive agency may perform any function or duty of such office." 5 U.S.C. § 3348(b)(1)-(2). The Congress did not want the "head" of the NLRB—*i.e.*, the Board members—to perform the duties of the General Counsel because the NLRA intentionally "separate[s] the official who investigate[s] and charge[s] [ULPs] from the officials who determine whether th[e] statute ha[s] actually been violated." S. REP. NO. 105-250, at 20; *see also Haleston Drug Stores v. NLRB*, 187 F.2d 418, 421 n.3 (9th Cir. 1951). "If the nondelegable duties of the[ ] general counsel were somehow to be performed by the [Board members] that policy would be obliterated." S. REP. NO. 105-250, at 20. This explains why the Congress exempted the General Counsel from *section 3348(b)* but we are unsure why the Congress also exempted the General Counsel from *section 3348(d)* (*i.e.*, the no-ratification and void-ab-initio provisions).

arguments the Board posits in its supplemental brief. We express no view on whether section 3348(e)(1) could be understood more broadly to wholly insulate the Acting General Counsel's actions even in the event of an FVRA violation. We similarly express no view on defenses the Board never raised. *See United States v. Hasting*, 461 U.S. 499, 510, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983) ("[W]e are not required to review records to evaluate a harmless error claim, and do so sparingly.").

i. Harmless Error

We first address the "rule of prejudicial error." 5 U.S.C. § 706. As previously discussed, we held in *Doolin* that any statutory defect in the acting director's authority was cured because a subsequent, properly appointed director ratified his actions. *See* 139 F.3d at 213. The Board does not rely on *Doolin*'s holding—understandably, inasmuch as no properly appointed General Counsel ratified the ULP complaint against Southwest. *See generally FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98-99, 115 S. Ct. 537, 130 L. Ed. 2d 439 (1994). The Board instead relies on a paragraph of dicta from *Doolin*. In *Doolin*, we analogized a complaint in an administrative enforcement proceeding to a grand jury indictment in a criminal proceeding. *See* 139 F.3d at 212. Defects in a grand jury indictment do not constitute reversible error, *Doolin* noted, unless they "prejudiced" the defendant. *Id.* (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988)). And a defect does not prejudice the defendant if a petit jury subsequently finds him guilty beyond a reasonable doubt. *Id.* (citing *United States v. Mechanik*, 475 U.S. 66, 73, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986)). The same logic might apply, we postulated in

Doolin, if an agency adjudicator finds a petitioner liable despite a defective administrative complaint. *See id.* *Doolin* ultimately declined to rely on this hypothesis, however, because the parties had not briefed it. *See id.* Here, on the other hand, the Board brings *Doolin*'s dicta to the forefront and argues that the NLRB's final order renders harmless any defect in the ULP complaint against Southwest.

The grand jury analogy in *Doolin*, like the doctrine of harmless error generally, focuses on the existence *vel non* of "prejudice[ ]" to the petitioner. *Id.* But a petitioner need not demonstrate prejudice in the first place if the alleged error is "structural" in nature. *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000). In the grand jury context, for example, the occurrence of race or sex discrimination in the selection of grand jurors constitutes a structural error that warrants automatic reversal. *See id.* at 1130-31 (citing *Vasquez v. Hillery*, 474 U.S. 254, 261 & n.4, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (race); *Ballard v. United States*, 329 U.S. 187, 195, 67 S. Ct. 261, 91 L. Ed. 181 (1946) (sex)). In the agency context, we concluded in *Landry* that "[i]ssues of separation of powers" are structural errors that do not require a showing of prejudice because "it will often be difficult or impossible for someone subject to a wrongly designed scheme to show that the design—the structure—played a causal role in his loss." *Id.* at 1131. "[D]emand for a clear causal link to a party's harm" would frustrate the "'prophylactic'" goal of the separation of powers—*i.e.*, "'establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.'" *Id.* (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995)). *Landry* rejected the argument

that subsequent de novo review by the Federal Deposit Insurance Commission could render harmless the fact that the ALJ was serving in violation of the Appointments Clause. *See id.* at 1130-32. "If the process of final de novo review could cleanse the violation of its harmful impact," *Landry* reasoned, "then all such arrangements would escape judicial review." *Id.* at 1132.

Southwest contends that an FVRA violation is a structural error that cannot be rendered harmless by subsequent de novo review. We do not reach that question, however, because we agree with another one of Southwest's arguments. Specifically, the grand jury analogy from *Doolin* is ill-suited in this case. In a criminal proceeding, the grand jury and petit jury are similarly situated and have the same basic task: determining the defendant's guilt under the requisite standard of proof ("probable cause" and "beyond a reasonable doubt," respectively). *See Mechanik*, 475 U.S. at 70, 106 S. Ct. 938. As such, "[a] later conviction by a petit jury supplies *virtual certainty* that a properly constituted grand jury would have indicted." *Landry*, 204 F.3d at 1131 (emphasis added). Here, however, we lack the same certainty. The NLRB General Counsel is statutorily independent from the Board, *see NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124, 108 S. Ct. 413, 98 L. Ed. 2d 429 (1987); *Sears, Roebuck*, 421 U.S. at 138-39, 95 S. Ct. 1504, and he has "final authority" over the issuance of ULP complaints, 29 U.S.C. § 153(d); *see also United Food*, 484 U.S. at 126, 108 S. Ct. 413 (General Counsel has "unreviewable discretion to file and withdraw a complaint"). He essentially exercises prosecutorial discretion: he need not issue a complaint even if he believes a ULP was committed. *See United Food*, 484 U.S. at 126, 130, 108 S. Ct. 413. Moreover, the

General Counsel sets the enforcement priorities for the NLRB and generally supervises its lawyers. *See* 29 U.S.C. § 153(d); *Sears, Roebuck*, 421 U.S. at 138-42, 95 S. Ct. 1504. During oral argument, the Board conceded that, if the General Counsel's office were vacant, the NLRB "would not be issuing complaints." Oral Arg. Recording 32:51-32:57. The Board nonetheless argued that, because the type of ULP charged against Southwest was not "of substantial legal interest" to Acting General Counsel Solomon, that particular complaint did not require submission to the General Counsel's Office for review beforehand. *Id.* at 32:06-32:51. Southwest rightly points out, however, that a different General Counsel may have imposed different requirements and procedures during his tenure. *See, e.g.*, Memorandum GC 11-11 from Acting Gen. Counsel Lafe Solomon to All Reg'l Dirs., Officers-in-Charge, and Resident Officers 1 (Apr. 12, 2011) (identifying four "groups" of matters that must be submitted to General Counsel for advice, including those that "involve a policy issue in which I am particularly interested" and "involve issues as to which the law is in flux as the result of Board or court decisions"). Accordingly, notwithstanding the final Board order, we cannot be confident that the complaint against Southwest would have issued under an Acting General Counsel other than Solomon. *See Haleston Drug Stores*, 187 F.2d at 422 n.5 ("[O]scillations in rigor are characteristic of prosecuting officers."). Our uncertainty is sufficient to conclude that Southwest has carried its burden of demonstrating that the FVRA violation is non-harmless under the Administrative Procedure Act. *See Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121 n.5 (D.C. Cir. 2010) (although "[t]he burden to demonstrate prejudicial error is on the party challenging agency ac-

tion," it "is not a particularly onerous requirement" (quotation marks and ellipsis omitted)). We therefore conclude that the NLRB order did not ratify or otherwise render harmless the FVRA defect in the ULP complaint against Southwest. We note, however, that our conclusion does not control whether the ineligibility of an official with prosecutorial responsibilities in other contexts should be considered harmless.

ii. De Facto Officer Doctrine

The only other argument in the Board's supplemental brief is the de facto officer doctrine. This oft-forgotten doctrine has "feudal origins," dating back to the 15th century. *Andrade v. Lauer*, 729 F.2d 1475, 1496 (D.C. Cir. 1984); *see also* Note, *The De Facto Officer Doctrine*, 63 COLUM. L. REV. 909, 909 n.1 (1963) ("The first reported case to discuss the concept of *de facto* authority was The Abbe of Fountaine, 9 Hen. VI, at 32(3) (1431)."). The doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder v. United States*, 515 U.S. 177, 180, 115 S. Ct. 2031, 132 L. Ed. 2d 136 (1995). In its most recent cases, however, the Supreme Court has limited the doctrine, declining to apply it when reviewing Appointments Clause challenges, *see id.* at 182-83, 115 S. Ct. 2031, and important statutory defects to an adjudicator's authority, *see Nguyen v. United States*, 539 U.S. 69, 78, 123 S. Ct. 2130, 156 L. Ed. 2d 64 (2003).

In its traditional form, the de facto officer doctrine distinguishes between "direct" and "collateral" attacks on an officer's authority. *Andrade*, 729 F.2d at 1496. A collateral attack challenges "government *action* on the

ground that the officials who took the action were improperly in office." *Id.* (emphasis added). The de facto officer doctrine bars such attacks. *Id.* A direct attack, by contrast, challenges "the *qualifications* of the officer, rather than the actions taken by the officer." *Id.* (emphasis added). The de facto officer doctrine allows such attacks but they can be brought via writ of quo warranto only. *Id.* at 1496-97. To obtain quo warranto against a federal official, an interested party must petition the Attorney General of the United States to institute a proceeding in federal district court. D.C. CODE §§ 16-3501-02. If the Attorney General declines, the interested party can petition the court to issue the writ instead. D.C. CODE § 16-3503. Both the Attorney General and the court, however, have "broad discretion" to decline to make use of quo warranto. *Andrade*, 729 F.2d at 1498.

This Court has rejected the traditional version of the de facto officer doctrine. *See id.* at 1498-99. Direct action via quo warranto is too "cumbersome," we explained in *Andrade*, and "could easily operate to deprive a plaintiff with an otherwise legitimate claim of the opportunity to have his case heard." *Id.* at 1498. We disapprove of any "interpretation of the de facto officer doctrine that . . would render legal norms concerning appointment and eligibility to hold office unenforceable." *Id.* Instead, we have held that collateral attacks on an official's authority are permissible when two requirements are satisfied:

> First, the plaintiff must bring his action at or around the time that the challenged government action is taken. Second, the plaintiff must show that the agency or department involved has had reasonable notice

> under all the circumstances of the claimed defect in the official's title to office.

Id. at 1499. Both requirements are met here.

The first requirement, as stated in *Andrade*, appears on its face not to fit this case. The plaintiffs in *Andrade* filed a separate suit for injunctive and declaratory relief, *id.* at 1479, which explains the Court's instruction to "*bring* [an] *action* at or around the time the challenged government action is taken," *id.* at 1499 (emphases added). Here, by contrast, Southwest is subject to an enforcement action brought *by the NLRB*. In these circumstances, we have held, a party satisfies the first *Andrade* requirement if it challenges an officer's authority as a *defense* to the enforcement action. *See FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993). Of course, the ordinary rules of exhaustion and forfeiture still apply. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38, 73 S. Ct. 67, 97 L. Ed. 54 (1952); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707 (D.C. Cir. 1996). In the administrative proceedings below, Southwest raised its FVRA challenge as an exception to the ALJ decision. It therefore complied with the NLRA's jurisdictional exhaustion requirement. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court," absent "extraordinary circumstances"); *id.* at § 160(f) (incorporating § 160(e)); *see also Trump Plaza Associates v. NLRB*, 679 F.3d 822, 829 (D.C. Cir. 2012) ("Cases interpreting section 10(e) look to whether a party's exceptions are sufficiently specific to apprise the Board that an issue might be pursued on appeal."). And the Board does not assert that Southwest's challenge was otherwise untimely or forfeited. Thus, we assume it was properly preserved.

Nor does the Board contest that the second *Andrade* requirement—notice—is also satisfied here. To meet this requirement, "the agency . . . [must] actually know[ ] of the claimed defect." *Andrade*, 729 F.2d at 1499. Notice ensures that the agency has a chance to "remedy any defects (especially narrowly technical defects) either before it permits invalidly appointed officials to act or shortly thereafter." *Id.*; *see also Wilkinson v. Legal Services Corp.*, 80 F.3d 535, 538 (D.C. Cir. 1996). Here, Southwest notified the NLRB of the defect in Solomon's authority by excepting to the ALJ decision. *See Andrade v. Regnery*, 824 F.2d 1253, 1256 (D.C. Cir. 1987) ("The filing of the underlying suit . . in and of itself notified the government of appellants' . . . challenge."). The Board does not challenge the adequacy of this notice. Moreover, the notice requirement is satisfied if the agency learns of the defect from *any* source, not only the petitioner. *See Andrade*, 729 F.2d at 1499 ("[We] do[ ] not require . . . that the agency's knowledge of the alleged defect must come from the plaintiff."). The Board has not informed us when it first became aware of Solomon's problematic service. We therefore cannot say that its notice of the FVRA defect was inadequate. Accordingly, we conclude that the de facto officer doctrine does not bar Southwest from challenging Solomon's authority.

Finally, we emphasize the narrowness of our decision. We hold that the former Acting General Counsel of the NLRB, Lafe Solomon, served in violation of the FVRA from January 5, 2011 to November 4, 2013. But this case is not Son of *Noel Canning*[8] and we do not expect it to

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[8] *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), aff'd, — U.S. —, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014).

retroactively undermine a host of NLRB decisions. We address the FVRA objection in this case because the petitioner raised the issue in its exceptions to the ALJ decision as a defense to an ongoing enforcement proceeding. We doubt that an employer that failed to timely raise an FVRA objection—regardless whether enforcement proceedings are ongoing or concluded—will enjoy the same success. *See* 29 U.S.C. § 160(e); *Andrade*, 729 F.2d at 1499.

For the foregoing reasons, we grant the petition for review, deny the cross-application for enforcement and vacate the NLRB order.

So ordered.

APPENDIX B

SW General, Inc. d/b/a Southwest Ambulance *and* International Association of Fire Fighters Local I-60, AFL-CIO. Case 28-CA-094176

May 8, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On August 8, 2013, Administrative Law Judge Donna N. Dawson issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and con-

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[1] We adopt the judge's finding that the Respondent's unilateral cessation of longevity payments violated Sec. 8(a)(5) and (1) for the reasons stated in her decision and in *Finley Hospital*, 359 NLRB No. 9, slip op. 2 (2012). The Respondent did not except to the judge's finding that it violated Sec. 8(a)(1) by informing the Union, after the fact, of its decision to cease issuing longevity payments. Accordingly, we adopt that finding as well.

Member Miscimarra does not adopt the finding that the Respondent violated Sec. 8(a)(1) by a statement it made to the Union. The complaint did not allege an 8(a)(1) violation based on such a statement, the complaint was not amended at the hearing to allege such a violation, and the parties did not litigate this issue. To the

clusions and to adopt the recommended Order as modified[2] and set forth in full below.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 2.

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contrary, the record expressly negates such an allegation. Before the Respondent presented its case in chief, it asked for a clarification of the issues in the case, and counsel for the General Counsel stated: "The alleged unfair labor practices are set forth specifically in the complaint. And those are the only allegations being made at this time. Those are the only allegations that this hearing is going to determining [sic]" (Tr. 118). Accordingly, Member Miscimarra would reverse the judge's 8(a)(1) finding. Member Miscimarra also dissents from the majority's finding that the judge properly concluded the Respondent violated Sec. 8(a)(5) by discontinuing longevity payments following expiration of the collective-bargaining agreement. Because the contract language expressly limits Respondent's longevity pay obligation to specified dates during "each year of this Agreement," Member Miscimarra believes that the Board cannot reasonably conclude the Respondent implemented a "change" by giving effect to this language and limiting its longevity payments to the agreement's term. See *Finley Hospital*, supra, 359 NLRB No. 9, slip op. at 10-12 (Member Hayes, dissenting).

The Respondent excepted to the judge's ruling to exclude CFO Roy Ryals's testimony regarding his intent in drafting the original longevity pay provision in the parties' 2001 collective-bargaining agreement. We find, for the reasons stated by the judge, that the exclusion of that testimony was not an abuse of discretion.

[2] We shall modify the judge's Conclusions of Law and recommended Order to conform to her findings and to the Board's standard remedial language. We shall substitute a new notice in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

"2. The Charging Party, International Association of Fire Fighters Local I-60, AFL-CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act and is the recognized collective-bargaining representative of a bargaining unit composed of full-time and regular part-time EMT, EMT-I, Paramedics, and Registered Nurses."

2. Insert the following after the judge's Conclusion of Law 3 and renumber the subsequent paragraph.

"4. The Respondent violated Section 8(a)(1) of the Act by notifying the Union, after the fact, of its decision to discontinue longevity pay."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing longevity payments as described in article 44 of the July 1, 2009 to July 1, 2012 collective-bargaining agreement, as extended to September 8, 2012, we shall order it to notify and, on request, bargain collectively and in good faith with the Union before implementing any changes in wages, hours, or other terms and conditions of employment. In addition, we shall order the Respondent to rescind the unlawful change and resume issuing biannual longevity payments to eligible employees until an agreement has been reached with the Union or a lawful impasse in negotiations occurs. We shall further order the Respondent to make em-

ployees whole for any losses sustained as a result of the unlawful change, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate the affected employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay award(s) covering periods longer than 1 year.

ORDER

The National Labor Relations Board orders that the Respondent, SW General, Inc. d/b/a Southwest Ambulance, Mesa, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Unilaterally discontinuing biannual longevity payments as described in article 44 of the July 1, 2009-July 1, 2012 collective-bargaining agreement, as extended to September 8, 2012.

(b) Notifying the International Association of Fire Fighters Local 1-60, AFL-CIO (the Union), after the fact, that Respondent had decided to cease issuing longevity payments contained in the July 1, 2009-July 1, 2012 collective-bargaining agreement, without giving the Union notice or an opportunity to bargain.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of its employees in the following appropriate unit:

> All full-time and regular part-time EMT, EMT-I, Paramedics and Registered nurses, but excluding any oncall part-time employees, office clerical employees, guards, watchmen and supervisors as defined in the Act.

(b) Resume issuing biannual longevity payments to eligible employees as described in article 44 of the July 1, 2009-July 1, 2012 collective-bargaining agreement until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

(c) Make employees whole for any losses sustained as a result of the unlawful change made on December 3, 2012, with interest, in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in

electronic form, necessary to analyze the amount of money to be reimbursed under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Mesa, Arizona, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 3, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provid-

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[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ed by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. May 8, 2014

Mark Gaston Pearce, Chairman

Phillip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally discontinue issuing biannual longevity payments as described in article 44 of the July 1, 2009-July 1, 2012 collective-bargaining agreement, as extended through September 8, 2012.

WE WILL NOT notify the International Association of Fire Fighters Local I-60, AFL-CIO (the Union), after the fact, of our decision to cease making longevity payments contained in the July 1, 2009-July 1, 2012 collective-bargaining agreement, when we have not given the Union notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively with the Union as the exclusive bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time EMT, EMT-I, Paramedics and Registered Nurses, but excluding any on-call part-time employees, office clerical employees, guards, watchmen and supervisors as defined by the Act.

WE WILL resume issuing biannual longevity payments to eligible employees as described in article 44 of the July 1, 2009-July 1, 2012 collective-bargaining agreement until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

WE WILL make you whole, with interest, for any losses sustained as a result of the unlawful cessation of biannual longevity payments on December 3, 2012.

SW GENERAL, INC. D/B/A
SOUTHWEST AMBULANCE

The Board's decision can be found at www.nlrb.gov/case/28-CA-094176 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Daniel B. Rojas, Esq., and Paul Irving, Esq., for the Acting General Counsel.

Todd A. Dawson, Esq. (Baker & Hostetler, LLP), of Cleveland, Ohio, for the Respondent.

Philip Elias, V.P. and Union Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Phoenix, Arizona, on April 23, 2013. The Charging Party Union, International Association of Fire Fighters, Local Union I-60, AFL-CIO (the Union) filed the charge in this case on December 3, 2012, and the Acting General Counsel (AGC) issued the complaint on January 31, 2013. (GC Exhs. 1(a) and 1(c)[1] The complaint alleges that Southwest General, Inc., d/b/a Southwest Ambulance (Respondent) violated Section 8(a)(5) and (1) of the Act when it made a unilateral change in working conditions without having afforded the Union notice, and an opportunity to bargain. More specifically, the complaint alleges that upon expiration of the most recent collective-bargaining agreement, from 2009-2012 (the 2009 Agreement) (Jt. Exh. 4), Respondent unilaterally discontinued biannual longevity payments to unit employees, pursuant to said agreement. Respondent denied, in its answer[2], that it had any obligation to continue longevity payments once the 2009 Agreement expired, and denied any other unlawful conduct alleged in the complaint. The Respondent asserted several affirmative defenses, including that any contractual dispute that exists should

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[1] Exhibits received into evidence are referred to here as "GC Exh."for General Counsel Exhibit; "R Exh." for Respondent Exhibit; and "Jt. Exh." for Joint Exhibit. The parties' briefs will be referred to here as "GC Br." for General Counsel's brief, and "R Br." for Respondent's brief.

[2] During the trial, Respondent amended its answer to admit to pars. 5(a) and 5(b) of the complaint. (Tr. 89.)

be deferred to an arbitrator, and not interpreted by the Board. (GC Exh. 1(e); Tr. 222-223.)[3]

After the trial, the Acting General Counsel and the Respondent filed briefs, which I have read and considered. Based on the entire record in this case, including the testimony of witnesses, and my observation of their demeanor, I make the following

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[3] Respondent also asserted, as an affirmative defense, that the complaint must be dismissed because the President's purported appointments of two new Board members were unconstitutional and invalid. Respondent argued that the Board lacks a quorum since the expiration of member Becker's term on January 3, 2012 (citing *New Process Steel v. NLRB*, 1380 S. Ct. 2635, 2640 (2010) (held "two [remaining Board] members may [not] continue to exercise that delegated authority once the group's (and the Board's) membership falls to two." (GC Exh. 1(e).) This argument lacks merit here, however, as the Board rejects any ruling that it does not have the requisite three-board member authority. I am aware that the United States Court of Appeals, D.C. Circuit, in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), concluded that the President's recent recess appointments to the Board were not valid. However, as noted by that Court, this conclusion is in conflict with at least three other courts of appeals' rulings. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). Thus, the Board has rejected this argument, as the issue regarding the validity of recess appointments "remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act." See *G4S Regulated Security Solutions*, 359 NLRB No. 101, slip op. at 1, fn. 1 (2013), citing *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn. 1 (2013).

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Mesa, Arizona (Respondent's facility), provides emergency and nonemergency ambulance services throughout the State of Arizona by contracting with hospitals, nursing homes, municipalities, counties and other local government entities (Tr. 119, 120-121). During a representative 1-year period, ending December 3, 2012, Respondent purchased and received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Michigan. During that same representative period, Respondent received gross revenues in excess of $250,000. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties admit, and I also find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

Respondent Southwest Ambulance contracts with municipalities and other government entities, including unincorporated areas of counties within the State of Arizona to provide emergency 911 ambulance services. It also provides critical care and convalescent facility ambulance transportation services between hospitals, and between hospitals and nursing homes and vice versa. Id.

Respondent has admitted, and I find, that since 1992 (Jt. Exhs. 1(e) and 1(c)), and at all relevant time

periods here, Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit. This recognition has also been embodied in successive collective-bargaining agreements, including the most recent 2009 Agreement. (GC Exhs. 1(e), p. 2 and 1(c), p. 2; Jt. Exhs. 1-4; Tr. 121.) The employees of the respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and include:

> All full-time and regular part-time EMT, EMT-I, Paramedics and Registered Nurses, but excluding any on-call part-time employees, office clerical employees, guards, watchmen and supervisors as defined in the Act.

(Jt. Exhs. 4; GC Ex. 1(e).)[4] The unit currently includes approximately 800 employees (Tr. 88, 121), of Respondent's Southwest Emergency Medical Services Group's Maricopa, Pinal, Pima and Graham County nonfire integrated ambulance operations. (GC Exh. 1(e); Jt. Exh. 4, p. 4.)

Respondent's chief operating officer (COO), Roy Ryals, is responsible for most of Southwest Ambulance's operations, including management-union negotiations and contract administration and internal adjudication of grievances and labor disputes. (Tr. 120.) He has participated in collective-bargaining negotiations between Respondent and the Union, as the lead negotiator or conegotiator, since at least the late 1990's or early 2000's, as well as the drafter of 2009 Agreement at issue here. (Tr. 121-124.) John Karolzak,

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[4] EMT- Emergency Medical Technician.

employed by Respondent's parent company, Rural/Metro Corporation, is Respondent's Southwest Zone vice president. Tuesday Kramer is the human resource manager and Cassandra Collins is the payroll manager. Roy Ryals and Cassandra Collins testified during the trial, but Karolzak and Kramer were not called as witnesses.[5]

The current union president is Adam Lizardi,[6] who has held that position since January 2012. Prior to that, he was the Union's business manager for several years, serving on the Union's contract negotiations team since about 2006. Other union officers with whom Lizardi works on his negotiations team are Kevin Burkhart, treasurer; P J Elias, vice president; Eddy Dobiecki and Michael Lovett, business managers (Tr. 91-92, 101). Only Lizardi testified at the hearing.

Longevity Pay

1. History

Respondent and the Union first reached an agreement on language concerning longevity pay during negotiations of their 2001 collective-bargaining agreement. This language was set forth in article 45 of that agreement, entitled "Longevity Pay"; and referred to biannual payments for long-term employees

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[5] Respondent initially denied in its answer that Ryals and Collins were supervisors, but amended its answer during the trial to admit they were supervisors and agents of Respondent. (GC Exh. 1(e); Jt. Exh. 8; Tr. 32.)

[6] Lizardi is also an Emergency Medical Technician, with just over 19 years of service with Southwest Ambulance/Respondent. (Tr. 90.)

after they reached a qualifying threshold of service with Respondent. Respondent and the Union continued to include a "Longevity Pay" article in successive collective-bargaining agreements from June 2003 through September 2009[7] (Jt. Exhs. 1-4), without any lapses in agreements between May 2001 through September 2012. (Tr. 102.) In fact, the language contained in the "Longevity Pay" articles remained virtually unchanged in these agreements, except for the 2003 Agreement, in which the parties agreed to add a separate tier of longevity pay for employees with 15 years or more seniority. (Id.)

The parties stipulated that pursuant to these collective-bargaining agreements, Respondent issued biannual longevity payments (in June and December)[8] to eligible unit employees from 2001 through June 2012, the month during which the most recent 2009 Agreement initially expired. (Jt. Exh. 8.)

According to current Union President Adam Lizardi, the Union initially wanted the longevity pay provision to give senior employees an opportunity to con-

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[7] The 2001 collective-bargaining agreement (2001 Agreement) was to remain in effect until 2004, but the parties entered into negotiations early and signed a new collective-bargaining agreement that became effective in June 2003 (2003 Agreement) through June 2006, keeping the "Longevity Pay" provision in art. 45. In the subsequent 2006 and 2009 Agreements, this provision was placed in art. 44. The 2006 Agreement was effective from August 2006 through July 1, 2009, and the last and most recent agreement became effective on July 1, 2009 (2009 Agreement). (Jt. Exhs. 1-4.)

[8] These payments were included in either the first or second pay checks issued in June and December of each year from 2001 through June 2012. (Tr. 96-97.)

tinue to receive a raise during a time when Respondent had placed caps on annual hourly wage increases at 10 years of service.[9] (Tr. 109-111.) Respondent asserted that this testimony be disregarded since Lizardi was not present during the 2001 contract negotiation meetings when the parties began to implement longevity pay language. (R Br.) However, Lizardi recalled that in 2001 union officials offered this explanation to union members when the 2001 Agreement was brought to them for a vote. He also remembered that this historical basis for longevity pay was discussed during subsequent union board meetings, of which he was a part. (Tr. 101-102, 109-111.) Lizardi was credible in his presentation, and Respondent did not present any evidence to dispute this explanation. However, I credit this testimony for historic background only, as it is not material or critical in the determination of liability in this case. Neither Lizardi nor Ryals offered an explanation for maintaining this benefit, nor do I find one is necessary. Lizardi acknowledged, and there is no dispute, that after Respondent removed the caps on hourly wage increases[10] the parties agreed and continued to include longevity pay articles in successor agreements. (Jt.

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[9] While Lizardi recalled a pay scale in 2001, when the Longevity Pay article was implemented, that "topped out" at 10 years, the collective-bargaining agreements effective from 2001 to 2003 and 2003 to 2006 reveal that annual wage increases were actually capped at 11 years for all Emergency Medical Technicians and Registered nurses, and at 13 years for Paramedics (i.e., caps were dependent upon employees' job classifications). (Jt. Exh. 1 pp. 50-52; Jt. Exh. 2, p. 51 and appendix A.)

[10] See fn. 8, above.

Exhs. 3, pp. 31-32; 4, p. 53.) Thus, I find there is a long- standing history and practice, no matter what the reason or origin, for Respondent and the Union to agree to longevity pay provisions.

While the parties sharply disagree as to whether Respondent had an on-going obligation to issue longevity pay after the expiration of the 2009 Agreement, neither Lizardi nor Ryals recalled any discussions among the Respondent-Union 2009 negotiations team members as to this obligation. (Tr. 109, 170.)

During the trial, the parities disagreed as to whether the longevity pay was a "payment" or "bonus." Respondent made a point of referring to the payments at issue during the trial as "longevity bonuses," and in its answer as "longevity bonuses" and "longevity bonus payments." inferring a distinction between "pay" and "bonus." (GC Exhs. 1(e); Jt. Exhs. 1-4.) However, Respondent did not proffer any arguments to support such a distinction. Nor did it specifically argue that longevity pay was not a mandatory subject of bargaining. Respondent did assert that these payments were separate, stand-alone events, and not an ongoing practice, and did not affect regular wages or otherwise impact future terms and conditions. (R Br., pp. 7-8.) Both parties repeatedly included articles entitled "Longevity Pay" in their successive collective-bargaining agreements implemented from 2001 through 2012. (Jt. Exhs. 1-4.) When asked to describe "longevity pay" or "longevity bonus," Ryals responded that "[i]t is a payment that's made to employees that have achieved ten-plus years of service." (Tr. 121.) He also repeatedly identified the payment as "longevity pay" during his testimony,

even when questioned by Respondent's attorney. (Tr. 57, 150, 163, 166-167.) It matters little to the ultimate question in this case what the parties chose to call the longevity payments. While these payments may not have been a part of regular wages or overtime pay, I find the parties agreed that they be paid to more senior employees as a type of enhancement or addition to regular wages.

2. Article 44 of the 2009 Agreement

The most recent collective-bargaining agreement became effective July 1, 2009, and remained in effect until July 1, 2012. (Jt. Exh. 4.) The "Longevity Pay" provision of the 2009 Agreement in article 44, which is at issue in this case, provided in relevant part:

> 44.1 Every December 1st and June 1st of each year of this Agreement, employees who have completed at least ten years of full-time service but less than 15 years of [full-time] service shall qualify for $100.00 for each year of continuous full-time service in excess of nine years.
>
> 44.2 Employees that have completed 15 or more years of full-time service shall receive $150.00 for each year of continuous [full-time] service in excess of nine years, up to a semi-annual maximum of $3,000.00 and an annual maximum of $6,000.00.
>
> 44.3 Employees on industrial leave shall qualify for this payment for only the first six (6) months of industrial leave.
>
> 44.4 Payments will be made to employees who are active as of the date payment is made. Payments

will be paid no longer than 30 days after the qualifying date.

44.5 An employee must be in good standing as of the qualifying date to receive longevity pay. Good standing shall be defined as not currently on probation for prior actions, being in compliance with attendance and timeliness policies, and maintaining acceptable documentation performance during the prior six (6) month period.

(Jt. Exh. 4, p. 61 of 62.)

3. Other relevant provisions of the 2009 Agreement[11]

Article 3, entitled "Duration of Agreement," Section 3.1 provided, in relevant part: "[t]his Agreement shall be considered effective July 1st, 2009 and shall remain in effect until July 1, 2012." The cover page of the 2009 Agreement contains the following: "Effective Dates: July 1st, 2009-July 1st, 2012." (Jt. Exh. 4, p. 6 of 62; p. 1 of 62.)

Article 36—"Hourly Pay," Section 3.1 of this Agreement provided in relevant part:

36.1 Beginning with the first full pay period following the signing of this labor agreement, each active/current employee covered under this agree-

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[11] Respondent cited to or referenced these other provisions to support its theories that the Union either agreed to a set number (six) of longevity payments during the specific term of the 2009-2012 Agreement, waiving its right to bargain, or waived its right to bargain by failing to file a grievance or unfair labor practices (ULP) charge when Respondent discontinued pay increases under art. 36 of the 2009 Agreement. These theories will be discussed in the Discussion and Analysis sections of this decision. (R. Br.)

ment will receive a 4% increase including retroactive pay for hours worked since July 1, 2009. This retro payment will be based on only hours worked in a position covered in this labor agreement.

36.2 Beginning with the first full pay period in July 2010, each employee covered under this agreement will receive a 2.5% increase.

36.3 Beginning with the first full pay period in July 2011, each employee covered under this agreement will receive a 3.5 % increase.

(Jt. Exh. 4, p. 53 of 62.)

4. Expiration of 2009 Agreement and discontinuance of longevity pay

The 2009 Agreement expired on September 8, 2012. It initially expired on July 1, 2012, pursuant to the effective dates in the agreement, but the parties entered into three consecutive, temporary agreements to extend the 2009 Agreement through September 8, 2012. (Jt. Exh. 4, p. 6 and Jt. Exhs. 5-7.) However, the parties began negotiations for a successor agreement in about March 2012, and in fact, continue to meet and negotiate for a new agreement. (Tr. 54-55, 92-93; GC Exh. 2.) The parties agree to the most material facts following the expiration of the 2009 Agreement. They agree that Respondent made the last longevity payment to eligible unit employees in June 2012, and refused to continue to make these payments in December 2012 and thereafter. Respondent, through COO Ryals' testimony and stipulations, admits that it did not provide the Union with notice or an opportunity to bargain prior to the decision to discon-

tinue longevity payments.[12] In fact, Ryals did not "believe there was any need for [Respondent] to notify them." He asserted that "[t]he plain language of the CBA that was expired, there was no continuing process that I would notify them about." (Tr. 59-60; 166; Jt. Exh. 8.)

Although questioned at length as to who made the decision to discontinue longevity pay, and with whom he discussed the decision, it is evident from Ryals' undisputed, unwavering testimony that he made the decision to terminate longevity pay after the 2009 Agreement expired, and that Respondent sanctioned this decision. (Tr. 56-60.) Ryals did not, however, inform the Union of his decision until December 3, 2012, when Lizardi contacted Respondent's payroll manager, Cassandra Collins,[13] via email, to ask if the "longevity checks would be in the next check or the one after[.]" Collins initially responded "[t]he one after," but 13 minutes later, emailed the following: "Sorry, but from what I understand we won't be paying any longevity yet." She then clarified that "the company is not planning on paying longevity." Lizardi forwarded these emails to the Union Treasurer, Kevin Burkhart. (GC Exh. 4.) Kevin Burkhart

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[12] The parties also stipulated had Respondent issued longevity pay pursuant to the formula set forth in the 2009 Agreement, payment would have totaled $87,150 to 138 bargaining unit employees. (Jt. Exh. 8.)

[13] Collins normally administered the actual payments as directed by Respondent. She did not make decisions as to whether or not payments would be issued. (Tr. 73-77.)

subsequently asked Ryals "to do the right thing,"[14] and issue the longevity pay, but Ryals denied the request. (Tr. 57, 60; Jt. Exh. 8.)

> I credit Lizardi's undisputed testimony that he and one or more of his other Union officials contacted Respondent almost immediately after he received word from Collins that the longevity benefit would not be paid. They inquired as to the reason why it was not paid. As previously stated, Respondent admits that it refused to honor this request or give the Union an opportunity to bargain over its decision not to make longevity payments.

Ryals recalled that he verbally communicated his decision to stop longevity pay to his managers and other company executives, and that no one disagreed. (Tr. 57, 139-140.) The only email produced regarding written communication to other managers/officials was dated September 11, 2012, and entitled "Local I-60 Negotiations Update." While it confirmed that the parties were still working together to negotiate a new agreement after the 2009 contract expired, it did not mention longevity pay, or other specific provisions in the 2009 Agreement. It did state in pertinent part:

> Managers:
>
> By now you have all heard that the contract with Local I-60 has expired and the company did not extend the contract. This is true.

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[14] Ryals did not specifically recall this conversation with Burkhart, but admitted that "Kevin says things like that, it wouldn't be out of character for him." (Tr. 60.)

[W]e agreed to begin negotiations in March, well before the June expiration date of the existing contract.

. . . .

Much to the Company's surprise, during our first negotiation session on March 27th, the Union announced that they wanted to completely scrap all articles in the existing contract, which took literally hundreds of hours to negotiate over the years, and start over.

The Company has negotiated in good faith and, as such, extended the existing contract twice. The Company did not feel that continued extension of the contract would result in any improvements in the negotiations process. Thus, the Company declined to take such action. Obviously the process is taking longer than anyone wants, but a lot of progress has been made. We are optimistic that we will be able to reach Agreement in a timely manner on the remaining outstanding articles.

Now what does this all mean to you and how you manage your direct reports? The answer is, pretty much nothing.

Wages benefits and working conditions remain unchanged. The disciplinary process remains unchanged. The disciplinary process remains unchanged at your level. All policies, procedures, and standard operating procedures remain unchanged.

In other words, it is business as usual

> While there are a few changes that the Law allows, like the ability of the Union to Strike and the ability of the Company to Lock Out the workforce, no one is even contemplating strikes or lockouts that I am aware of. Again, your responsibility is to perform business as usual.[15]

(GC Exh. 2; Tr. 150-151.)

In August 2012, prior to the expiration of the 2009 Agreement, the parties reached a tentative agreement (TA)[16] to retain a longevity pay provision in the new or successor agreement that would remain identical to the in article 44 of the 2009 Agreement. (Tr. 55-56; 95-97.)

Ryals testified that he drafted the longevity language in the collective-bargaining agreements from 2001 through 2009. (Tr. 123, 124.) He explained that his understanding of what Respondent committed to in art. 44 of the 2009 Agreement was that "longevity pay would be paid out on the two dates specified, which were . . . July and December of each year that the

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[15] It appears from this correspondence to managers, that Ryals may not have made his decision to discontinue longevity payments as of September 11, 2012 (3 days after the expiration of the Agreement). His testimony indicates that he probably made his decision in November 2012 or before the time that longevity pay historically being paid out to someone. (Tr. 57.)

[16] Both Ryals and Lizardi explained that a TA occurs when both negotiating parties to a new or successor agreement agree to the language of a particular provision, pending approval of a final collective-bargaining agreement. (Tr. 55-56; 95-97.)

agreement [went] into effect. When the agreement was no longer in effect, the company had no obligation, and nor would [he] believe the plain language indicates that payment [would continue]." He asserted that the Company believed it was agreeing to only "a total of six payouts for longevity," and those were the only payments made throughout the course of the 2009-2012 Agreement. (Tr. 165-166.) Clearly, the Union has a different understanding as to what would occur after the expiration of the 2009 Agreement. I find that this is a legal dispute rather than a factual one, and that the 2009 Agreement was silent as to what would happen to the longevity provision in the event it expired. Respondent refused to stipulate that the parties had not discussed with each other their post-expiration expectations for the 2009 Agreement, either during negotiating sessions or otherwise, leading up to the 2009 contract. However, it is uncontested that neither Lizardi nor Ryals could recall any discussions among the parties' negotiating team members regarding what would happen to the biannual longevity payments if the 2009 Agreement expired without a successor agreement in place.[17] (Tr. 109-110, 170.) Thus,

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[17] There was a lot of trial discussion as to whether or not Ryals or Tuesday Kramer took and kept bargaining session notes regarding longevity pay discussions. Ryals asserted that he nor Kramer had any such notes. On the other hand, Lizardi observed that in most meetings, Kramer appeared to be taking notes on her laptop, but he could not recall if she took notes during longevity pay discussions. (Tr. 94-95.) I tend to credit Lizardi's observations over Ryals' rather unequivocal, vague testimony that "[s]he's been there, she takes notes some of the time [s]ome of the time, she does not." (Tr. 48.) Since Kramer was not called by either party to settle this dispute, and neither Ryals nor Lizardi could

I find the parties did not discuss or come to an agreement, nor include in any agreement, what would occur to longevity pay once the 2009 Agreement expired.

III. DISCUSSION AND ANALYSIS

Legal Standards

1. Threshold issue is whether a determination of the merits should be deferred to a Grievance and Arbitration Process

I will first address Respondent's assertion that it may be appropriate to defer my decision in this case to an arbitrator pursuant to the 2009 Agreement's grievance and arbitration procedures. Respondent relies on the holding in *Nolde Bros., Inc. v. Bakery Workers Local 358*, 430 U.S. 243 (1977). (Tr. 22; GC Exh. 1(e); Jt. Exh. 4, pp. 37-41.)[18] Respondent asserted, at the trial and in its answer, that if the Agency alleges that it violated the collective-bargaining agreement, then any right that arises under the contract is arbitral, regardless of whether the contract has expired. (Tr. 22). As the Agency pointed out in its brief,[19] the Board has long recognized the appropriateness of deferring certain unfair labor practice charges in cas-

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recall specific discussions about longevity pay, other than in sessions for the new contract, this matter is not relevant or critical to the decision in this case.

[18] In its answer, and at trial, Respondent asserted this deferral argument as an affirmative defense, but did not address it in its brief. (R. Br.) However, since Respondent has not officially abandoned this affirmative defense, it is appropriate to address it as a threshold issue before deciding the merits of the unfair labor practice issue.

[19] R. Br. pp. 11-12.

es where a union and employer have active grievance and arbitration procedures in place. See *University Moving & Storage Co.*, 350 NLRB 6, 20 (2007), citing *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984) (the Board reaffirmed and bolstered its doctrine in *Collyer Insulated Wire*, supra).

Under *Collyer Insulated Wire*, supra, and *United Technologies Corp.*, supra at 558, deferral is appropriate when:

> [T]he dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity [or "enmity"] to the employees' exercise of protected rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution [by arbitration].

University Moving & Storage Co., supra at 20. In the instant case, the parties had a long and productive collective-bargaining relationship, with no claim of employer animosity, as evidenced by the successive agreements and on-going negotiating towards a new agreement. However, this case does not pass the *Collyer Insulated Wire* test, in that the 2009 Agreement does not encompass the dispute at issue. In fact, as discussed further here, the 2009 Agreement specifically stated that the arbitration clause would not survive the Agreement.

In *Nolde Bros., Inc. v. Bakery Workers Local 358*, 43, supra at 243, the Supreme Court held that when the parties have agreed to arbitrate grievances arising under a collective-bargaining contract, that obligation is presumed to continue once the contract has expired. In a subsequent case, the Supreme Court clarified its holding in *Nolde Bros., Inc.*, supra, stating that "*Nolde Bros., Inc.*, supra, 430 U.S. at 255 . . found a presumption in favor of postexpiration arbitration of disputes unless negated expressly or by clear implication so long as such disputes arose out of the relation governed by the contract." *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 191-192 (1991).

The facts in *Nolde Bros., Inc.*, are easily distinguished from this case. First, the case involved a suit to compel arbitration under the arbitration provisions of an expired collective-bargaining agreement, which, unlike the arbitration in the instant case, was silent regarding postexpiration grievances or arbitration. The union alleged the employer was obligated to arbitrate its refusal to provide severance pay, under the expired agreement, to displaced employees who had worked for the company for at least 3 years. The employer argued that its obligation to arbitrate (and pay the displaced employees) died with the contract because the event leading to displacement and giving rise to the dispute—the closing of the plant—occurred after the expiration of the contract. The Court held that "[t]he dispute . . . although arising after the expiration of the collective-bargaining contract, clearly arises under that contract." *Nolde Bros.*, supra at 249. The Court observed that parties had agreed in

the expired contract's arbitration clause to attempt to resolve "all grievances," but that the contract was silent as to postexpiration grievances. It held that "in the absence of some contrary indication, there are strong reasons to conclude the parties did not intend their arbitration duties to terminate automatically with the contract." *Nolde Bros.*, at 253. The Court concluded "[i]n short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication." *Nolde Bros.*, supra at 255.

In *S & W Motor Lines*, 236 NLRB 938 (1978), the Board adopted the position that the arbitration provision did not survive contract expiration because the *Nolde* presumption favoring arbitrability of postexpiration disputes had been negated by express language in the contract. Unlike the contract in *Nolde*, but like the contract in *S & W Motor Lines*, supra, the expired 2009 Agreement in this case explicitly states that the parties' grievance and arbitration procedure "does not survive the term of this Agreement." (Jt. Exh. 4, p. 37.)[20] Therefore, I find no basis upon which to defer the merits of this case to arbitration where the parties clearly decided that arbitration would not survive the

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[20] The Board has consistently recognized that the parties generally do not have an obligation to adhere to the terms of an expired arbitration agreement. See *Indiana & Michigan Electric Co.*, 284 NLRB 53, 57 (1987) (the Board reaffirmed its view that "the arbitration commitment arises solely from mutual consent. Congress did not intend the [NLRA] to create a statutory duty to arbitrate," and recognized deferral of charge to be inappropriate where grievances were triggered by events occurring after the expiration of contacts").

contract. Furthermore, the parties to this expired 2009 Agreement "have no contractual obligation to adhere to the agreement's arbitration procedure in processing grievances arising after the agreement's arbitration date." See *W. H. Froh, Inc.*, 310 NLRB 384, 386 (1993), citing *Indiana & Michigan Electric Co.*, 284 NLRB 53, 57 (1987), and *Hilton-Davis Chemical Co.*, 185 NLRB 241, 242 (1970).[21]

2. Discontinuance of longevity pay after expiration of the 2009 Agreement

Mandatory Subject of Bargaining

First, I find that longevity pay, as described in article 44 of the 2009 Agreement, as well as the three predecessor agreements, is clearly a mandatory subject of bargaining.[22] The Board has recognized longevity pay as a mandatory subject of bargaining. In *Pine Brook Care Center*, 322 NLRB 740, 748 (1996), the Board adopted the Administrative Law Judge's findings which including a finding that certain bene-

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[21] The Board in *W. H. Froh, Inc.*, supra at 386 fn. 5, noted that *Hilton-Davis* has been cited with approval by the Supreme Court in *Litton Financial Printing Div. v. NLRB.*, 501 U.S. 190 (1991).

[22] While Respondent does not assert that longevity pay is not a mandatory subject of bargaining, at trial, it insisted on characterizing longevity pay as a "longevity bonus" or "bonus," rather than agreeing that it is the same as "longevity pay." However, as I found earlier in this decision, art. 44, drafted by Ryals, and approved by the Union, is entitled "Longevity Pay," and both parties have certainly referred to benefit as a "bonus" or "pay" interchangeably throughout these proceedings. Nevertheless, no matter what they call it, it is clearly an economic benefit flowing from the relationship between the employer and unit employees, and a mandatory subject of bargaining as discussed here.

fits, including "longevity pay," constituted terms and conditions of employment which were "clearly" mandatory subjects of bargaining. Additionally, whether described as a "longevity bonus" of "longevity pay," I find article 44 describes a payment to eligible senior employees which constitutes a mandatory subject of bargaining.

Unilateral Change Violation

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees;" and has culminated into a longstanding rule that an employer violates Section 8(a)(5) if it "unilateral[ly] change[s] conditions of employment under negotiation, for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Furthermore, it is well settled that the unilateral change doctrine set forth in *NLRB v. Katz*, supra, whereby an employer violates the NLRA if it effects a unilateral change of an existing term or condition of employment, without bargaining to impasse, extends to cases in which an existing agreement has expired and negotiations on a new one are pending. See, e.g., *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 6 (1988), *Litton Financial Printing Div. v. NLRB.*, supra, 191-192. Therefore, an employer's duty to maintain the status quo remains the same, during negotiations, when both the Union and employer have agreed to a particular term or condition of employment in a collective-bargaining agreement which has ex-

pired. *Finley Hospital*, 359 NLRB No. 9, slip op. at 2 (2012), citing *Litton*, supra at 198; *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, supra.

An employer may escape liability for a unilateral change violation if it proves that a union has expressed or implied a "clear and unmistakable waiver" of its right to bargain. *American Broadcasting Co.*, 290 NLRB 86, 88 (1988); *California Pacific Medical Center*, 337 NLRB 910 (2002).

The Board has relied on several factors in assessing whether a clear and unmistakable waiver exists: (1) language in the collective-bargaining agreement, (2) the parties' past dealings, (3) relevant bargaining history, and (4) other bilateral changes that may shed light on the parties' intent. See *Johnson-Bateman*, 295 NLRB 180, 184-187 (1989); *American Diamond Tool*, 306 NLRB 570 (1992). The party asserting the waiver, however, bears the burden of establishing the existence of the waiver. *Pertec Computer*, 284 NLRB 810 fn. 2 (1987).

Respondent, from the offset, does not raise the customary defense that the Union waived its right to bargain. Rather, Respondent asserts that the waiver doctrine is irrelevant in this case because it never changed existing terms and conditions of employment. In fact, Respondent even argues that "longevity bonuses" were not an ongoing practice, "but were limited by both parties in the 2009 Agreement to a fixed number of payments (six) on specified dates which "expired

of [their] own accord" once they were made.[21] Respondent contends that this calculated expiration did not constitute a "change," nor create an obligation to bargain, because Respondent made all longevity payments required by the expired 2009 Agreement. Respondent does argue, alternatively, that if I apply the "clear and unmistakable waiver" doctrine, Respondent's obligation would be satisfied much for the same reasons, i.e., that it met its obligation once the sixth payment was made. Respondent also avers, alternatively, that the Union implicitly waived its right to bargain when it failed to grieve or file a charge in connection to Respondent's termination of wage increases under Article 36 of the 2009 Agreement. It relies heavily its interpretation of Union President Adam Lizardi's testimony. (R Br.)

First, I have considered all of Respondent's arguments as to why its actions did not constitute a "change" or "unilateral change," and find they are unsupported by the case law and merits. Pursuant to *Katz*, supra, and its progeny cited here, Respondent effected a unilateral change of an existing term or condition of employment, without bargaining to impasse. This rule, as set forth above, has been ex-

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[21] Respondent made the last longevity payment in June 2009, prior to the expiration date of the longevity agreement. I must reject, however, this questionable assertion that longevity payments were not an ongoing practice. This belies the undisputed evidence that Respondent and the Union have in fact continued the practice of including longevity pay provisions in its collective-bargaining agreements since 2001. Furthermore, there is no language in the 2009 Agreement to even infer that issuance of biannual longevity payments was a one-time or occasional practice.

tended to cases such as the instant case, in which an existing agreement has expired and negotiations on a new one are pending. See, e.g., *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, supra at 544, n.6 (1988); *Litton Financial Printing Div. v. NLRB*, supra at 191-192. There is simply no dispute in this case that Respondent changed a term and condition of employment pending negotiations for a new contract.

Next, I find there is clearly no express waiver encompassed in the 2009 Agreement, and reject Respondent's assertion that the language in the Longevity Pay article 44, i.e., "Every December 1st and June 1st of each year of this Agreement," coupled with effective dates of the contract, represents the Union's express or implied waiver, much less a "clear and unmistakable" waiver of its bargaining rights. The Board rejected similar language in *Finley Hospital*, supra at 1, in which it found the respondent violated Section 8(a)(5) of the Act by unilaterally discontinuing the annual 3-percent pay raises provided in the parties collective-bargaining agreement upon expiration of the agreement. The Board applied the "clear and unmistakable waiver" standard in that case, requiring parties to "unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Finley Hospital*, supra at 2, citing *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-812 (2007).

The respondent in *Finley Hospital*, as in this case, relied on the multiple references, in the collective-bargaining agreement provision at issue, to the term of the agreement, i.e., "During Term of the Agreement," "For the duration of this Agreement," and "during the term of this Agreement." The Board found that while such references might limit the contractual obligation and right for any period after the contract expiration, "these references fail to 'unequivocally and specifically express [the parties'] mutual intention to permit unilateral employer action with respect to the [annual wage increases]." The Board recognized that neither the wage increase provision, nor the agreement as a whole, provided for any postexpiration action or conduct, much less expressly permit[ted] unilateral employer action" upon the expiration of the agreement. *Finley Hospital*, supra at 3, citing *Provena*, supra at 811.

Prior to Finley Hospital, the Board consistently reached this same result its cases involving postexpiration changes in terms and conditions established by an expired agreement. See *AlliedSignal Aerospace*, 330 NLRB 1216, 1216-1222 (2000), review denied sub nom. *Honeywell International v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001) ("[w]hatever the scope of the [r]espondent's obligation as a matter of contract, there is no basis for finding the [u]nion waived its [statutory] right to continuance of the status quo as to terms and conditions . . . after contract expiration); *General Tire & Rubber Co.*, 274 NLRB 591, 592-593 (1985), enfd. 795 F.2d 585 (6th Cir. 1986) (Board found the contract did not address employer's statutory obligation to pay benefits postexpiration of a contractual

benefit continuation period, and therefore did not constitute a waiver of the union's rights). The Board in this case distinguished *Finley Hospital* from Board decisions which found a "clear and unmistakable," because the contracts in those cases included postexpiration language. See *Cauthorne Trucking*, 256 NLRB 721 (1981), granted in part, denied in part 691 F.2d 1023 (D.C. Cir. 1982); *Oak Harbor Freight Lines*, 358 NLRB No. 41 (2012).

The contract language in the instant case, like that in *Finley Hospital*[24], and the other Board cases cited there, *AlliedSignal* and *General Tire*, sets limits on the effective periods of the contractual obligation, but fails to provide for the employer's postexpiration conduct or obligation or authorize unilateral changes by the employer. Respondent contends *Finley Hospital* is factually apposite from this case because the longevity payments provided in this case's 2009 Agreement were "separate, stand-alone [events] timed to occur on specific dates, and were not ongoing [practice] like the wage increases in *Finley Hospital*." This argument is completely unsupported by the evi-

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[24] I have considered, and dismiss, Respondent's argument that Finley Hospital should not be considered by me because it was decided by an improperly constituted Board, citing *Noel Canning v. NLRB*, supra, and *New Vista Nursing & Rehab.*, 2013 U.S. App. LEXIS 9860 (3d Cir. 2013). As decided earlier on in this decision, I find this argument is without merit, as the Board is not bound by these decisions. It has rejected this argument, as the issue regarding the validity of recess appointments is pending litigation and "definitive resolution." I note, as well, that the Board in Finley did not make decisions of first impression, but relied on well-settled Board and Court decisions.

dence, as discussed earlier. The longevity payments in the instant case were not "stand-alone" or "separate" events. Rather, they were consistent payments issued biannually in several successive agreements between Respondent and the Union from 2001 through 2012. In fact, while not at issue here, the parties admitted they agreed to a tentative agreement (TA) to continue to maintain the longevity payments in a successor agreement. Therefore, I find the employer in this case has not shown a clear and unmistakable waiver, of any kind, of its obligation to maintain the status quo created in the expired 2009 Agreement, and has therefore violated Section 8(a)(5) and (1) of the Act.

Respondent also argues that *Finley Hospital* is based on reasoning that has been rejected by the D.C. Circuit, and therefore should not be treated as binding or persuasive "in any sense." See *NLRB v. USPS*, 8 F.3d 832, 838 (D.C. Cir. 1993); *Enloe Medical Ctr. v. NLRB*, 433 F.3d 834, 837 (D.C. Cir. 2005). (R Br., p. 7, fn. 2.) The D.C. Circuit Court of Appeals rejected the Board's "clear and unmistakable" waiver doctrine in those cases, implementing instead, its own "waiver" vs. "covered by" doctrine.[25] While the Board is not

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[25] Held that "questions of 'waiver' normally do not come into play with respect to subjects already covered by a collective bargaining agreement," citing *NLRB v. USPS*, supra at 836-837. Instead, the proper inquiry is "simply whether the subject that is the focus of the dispute is 'covered by' the agreement." Id at 836. Also see *Dept. of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992). Unlike the subject matter in dispute in the D.C. Circuit Court of Appeals cases cited here, I find termination of longevity pay and the refusal

bound by the findings in these cases, as evidenced in its findings in *Finley Hospital*, I find that even applying the D.C. Court of Appeals doctrine here, Respondent's argument is without merit, and my decision remains the same. The Court of Appeals found in both cases that the companies' actions, including implementation of changes and refusal to bargain over the effects of those changes, were sanctioned by agreed-upon, existing collective-bargaining agreements. See *NLRB v. USPS*, supra at 834, 837; *Enloe Medical Ctr.*, supra at 837. The instant case is distinguishable in that the 2009 Agreement was not an existing agreement, and the 2009 Agreement's Management Rights clause or other provisions did not so authorize or "sanction" Respondent to discontinue longevity pay, and refuse to bargain. (Jt. Exh. 4, pp. 8-9 of 62.) Thus, the D.C. Circuit Court's waiver approach is not inapposite to this case, and I still find the Union in the instant case did not waive its bargaining rights.

Likewise, I reject the notion that the Union implicitly waived its right to bargain over the termination of longevity pay because it did not challenge, but rather, accepted limitations on hourly wage increases in Article 36 of the agreement. Article 36 of the 2009 Agreement provides for annual percentage increases in hourly pay beginning with the first full pay period following the signing of the agreement, and thereafter, beginning with the first full pay period in July 2010 and July 2011, for each "active/current employee cov-

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to bargain over the same was not "covered by" the 2009 Agreement.

ered under this agreement." Lizardi acknowledged that the Union did not take issue with this provision since it set forth specific dates and years for the increases and termination thereof. I agree, and so find, that the language in this provision is distinguishable from Article 44, in that it specifically terminated hourly wage increases 1 year before the contract ended. Notwithstanding my finding, the Board has rejected "waiver-by-inaction defense, finding the Union must have clear notice of the employer's intent to institute a change. *Rappazzo Elec. Co.*, 281 NLRB 471, 482 (1986).

I therefore conclude that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing longevity pay without first having afforded the Union notice and an opportunity to bargain. I further conclude that Respondent violated Section 8(a)(1) of the Act by notifying the Union, after the fact, of its decision that it would not be issuing longevity pay.

CONCLUSIONS OF LAW

1. SW General, Inc. d/b/a Southwest Ambulance (the Company) is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act and is the recognized collective-bargaining representative of a bargaining unit composed of the production, maintenance, clerical, technical, and office employees employed by the Company at its facility in Mesa, Arizona.

3. On or about December 1, 2012, and thereafter, the Company violated Section 8(a)(5) of the Act by failing to give notice and an opportunity to bargain with the Union prior to unilaterally terminating longevity payments for all eligible unit employees after the most recent expiration of the 2009 collective-bargaining agreement on September 8, 2012.

4. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall order it to cease and desist from such conduct and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully and unilaterally terminated longevity payments, and failed to distribute them to eligible unit employees as required by the parties' July 1, 2009, through July 1, 2012 contract, as extended to September 8, 2012, I shall order it to make whole for any loss of earnings or benefits suffered as a result of said unilateral change. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily under *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate the affected employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay award award(s)

covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB No.44 (2012).

On these findings of fact and conclusions of law, and on the entire record here, I issue the following recommended[25]

ORDER

The Company, SW General, Inc. d/b/a Southwest Ambulance, in Mesa, Arizona, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Unilaterally terminating unit employees' longevity pay benefits without first notifying the Union and affording it an opportunity to bargain concerning such change and its effects.

(b) In any like or related manner interfering with, restraining, or coercing Employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilateral material change to longevity pay implemented in December 2012, as it relates to discontinuing longevity payments every June 1st and December 1st of every year and maintain those terms, as set forth in the most recent collective-bargaining agreement between Respondent and the

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[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Union effective from July 1, 2009, through July 1, 2012, and extended by further agreements until September 8, 2012, and maintain those terms in effect until the parties have bargained and agreed to material changes and/or until the parties have agreed upon and implemented a new collective-bargaining agreement, or until Respondent has bargained to a good-faith impasse with the Union regarding longevity pay.

(b) Make any unit employees and former unit employees whole by reimbursing them for longevity pay, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), for any loss of benefits suffered as a result of the unilateral implemented changes to longevity pay.

(c) Within 14 days after service by the Region, post at its Mesa, Arizona facility, and Respondent's Southwest Emergency Medical Services Group's facilities, if any, in Maricopa, Pinal, Pima and Graham Counties, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees

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[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since December 1, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated at Washington, D.C. Aug. 8, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally implement material, substantial, and significant changes to our employees' longevity pay without providing the Union notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Federal law.

WE WILL rescind the unilateral material change to discontinue longevity pay implemented in December 2012, as it relates to elimination of biannual longevity pay to eligible unit employees consistent with article 44 of the collective-bargaining agreement, effective from July 1, 2009, through July 1, 2012, and extended through September 8, 2012, for all affected bargaining unit employees and former unit employees.

WE WILL, if requested by the Union, bargain in good faith over any material change in the eligibility of employees or former employees with 10 or more years of full-time service with Respondent as of December 1, 2012, and thereafter, and if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make whole, with interest, any current or former unit employee affected by the termination of longevity pay as of December 1, 2012, and thereafter, for any loss of earnings and other benefits suffered as a result of the unlawful unilateral change made to longevity pay.

SW GENERAL, INC. D/B/A SOUTHWEST AMBULANCE

APPENDIX C

NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case 28-CA-094176
JD(ATL)-20-13
Mesa, Az

SW GENERAL, INC., D/B/A SOUTHWEST AMBULANCE AND
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
LOCAL I-60, AFL-CIO

Aug. 8, 2013

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Phoenix, Arizona, on April 23, 2013. The Charging Party Union, International Association of Fire Fighters, Local Union I-60, AFL-CIO (the Union) filed the charge in this case on December 3, 2012, and the Acting General Counsel (AGC) issued the complaint on January 31, 2013. (GC Exh. 1(a) and 1(c)[1] The complaint alleges that Southwest General, Inc., d/b/a Southwest

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[1] Exhibits received into evidence are referred to here as "GC Exh." For General Counsel Exhibit; "R Exh." For Respondent Exhibit; and "Jt. Exh." For Joint Exhibit). The parties' briefs will be referred to here as "GC Br." for General Counsel's brief, and "R Br." for Respondent's brief.

Ambulance (Respondent) violated Sections 8(a)(5) and (1) of the Act when it made a unilateral change in working conditions without having afforded the Union notice, and an opportunity to bargain. More specifically, the complaint alleges that upon expiration of the most recent collective-bargaining agreement, from 2009-2012 (the 2009 Agreement) (Jt. Ex. 4), Respondent unilaterally discontinued biannual longevity payments to unit employees, pursuant to said agreement. Respondent denied, in its answer,[2] that it had any obligation to continue longevity payments once the 2009 Agreement expired, and denied any other unlawful conduct alleged in the complaint. The Respondent asserted several affirmative defenses, including that any contractual dispute that exists should be deferred to an arbitrator, and not interpreted by the Board. (GC Exh. 1(e); Tr. 222-223).[3]

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[2] During the trial, Respondent amended its answer to admit to pars. 5(a) and 5(b) of the complaint. (Tr. 89).

[3] Respondent also asserted, as an affirmative defense, that the complaint must be dismissed because the President's purported appointments of two new Board members were unconstitutional and invalid. Respondent argued that the Board lacks a quorum since the expiration of member Becker's term on January 3, 2012 (citing *New Process Steel v. NLRB*, 1380 S. Ct. 2635, 2640 (2010) (held "two [remaining Board] members may [not] continue to exercise that delegated authority once the group's (and the Board's) membership falls to two." (GC Exh. 1(e)). This argument lacks merit here, however, as the Board rejects any ruling that it does not have the requisite three-board member authority. I am aware that the United States Court of Appeals, D.C. Circuit, in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), concluded that the President's recent recess appointments to the Board were not valid. However, as noted by that Court, this conclusion is in conflict with at least three other courts of appeals' rulings. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert denied 544 U.S.

After the trial, the Acting General Counsel and the Respondent filed briefs, which I have read and considered. Based on the entire record in this case, including the testimony of witnesses, and my observation of their demeanor, I make the following

FINDINGS INDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Mesa, Arizona (Respondent's facility), provides emergency and nonemergency ambulance services throughout the State of Arizona by contracting with hospitals, nursing homes, municipalities, counties and other local government entities (Tr. 119, 120-121). During a representative 1-year period, ending December 3, 2012, Respondent purchased and received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Michigan. During that same representative period, Respondent received gross revenues in excess of $250,000. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties admit, and I also find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). Thus, the Board has rejected this argument, as the issue regarding the validity of recess appointments "remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act." See *G4S Regulated Security Solutions*, 359 NLRB No. 101, slip op. at 1, fn.1 (2013), citing *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn.1 (2013).

II. ALLEGED UNFAIR LABOR PRACTICES

Background

Respondent Southwest Ambulance contracts with municipalities and other government entities, including unincorporated areas of counties within the State of Arizona to provide emergency 911 ambulance services. It also provides critical care and convalescent facility ambulance transportation services between hospitals, and between hospitals and nursing homes and vice versa. Id.

Respondent has admitted, and I find, that since 1992 (Jt. Exhs. 1(e) and 1(c), and at all relevant time periods here, Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit. This recognition has also been embodied in successive collective-bargaining agreements, including the most recent 2009 Agreement. (GC Exhs. 1(e), p. 2 and 1(c), p. 2; Jt. Exhs. 1-4; Tr. 121). The employees of the respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and include:

> . . . all full-time and regular part-time EMT, EMT-I, Paramedics and Registered Nurses, but excluding any on-call part-time employees, office clerical employees, guards, watchmen and supervisors as defined in the Act.

(Jt. Exhs. 4; GC Ex. 1(e)).[4] The unit currently includes approximately 800 employees (Tr. 88, 121), of Respondent's Southwest Emergency Medical Services Group's Maricopa, Pinal, Pima and Graham County nonfire inte-

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[4] EMT- Emergency Medical Technician.

grated ambulance operations. (GC Exh. 1(e); Jt. Exh. 4, p. 4).

Respondent's Chief Operating Officer (COO), Roy Ryals, is responsible for most of Southwest Ambulance's operations, including management-union negotiations and contract administration and internal adjudication of grievances and labor disputes. (Tr. 120). He has participated in collective-bargaining negotiations between Respondent and the Union, as the lead negotiator or conegotiator, since at least the late 1990's or early 2000's, as well as the drafter of 2009 Agreement at issue here. (Tr. 121-124). John Karolzak, employed by Respondent's parent company, Rural/Metro Corporation, is Respondent's Southwest Zone Vice-President. Tuesday Kramer is the Human Resource Manager and Cassandra Collins is the Payroll Manager. Roy Ryals and Cassandra Collins testified during the trial, but Karolzak and Kramer were not called as witnesses..[5]

The current Union President is Adam Lizardi,[6] who has held that position since January 2012. Prior to that, he was the Union's business manager for several years., serving on the Union's contract negotiations team since about 2006. Other union officers with whom Lizardi works on his negotiations team are Kevin Burkhart, Treasurer, P J Elias, Vice President, Eddy Dobiecki and

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[5] Respondent initially denied in its answer that Ryals and Collins were supervisors, but amended its answer during the trial to admit they were supervisors and agents of Respondent. (GC Exh. 1(e); Jt. Exh. 8; Tr. 32).

[6] Lizardi is also an Emergency Medical Technician, with just over 19 years of service with Southwest Ambulance/Respondent. (Tr. 90).

Michael Lovett, Business Managers (Tr. 91-92, 101). Only Lizardi testified at the hearing.

Longevity Pay

1. History

Respondent and the Union first reached an agreement on language concerning longevity pay during negotiations of their 2001 collective-bargaining agreement. This language was set forth in Article 45 of that agreement, entitled "Longevity Pay;" and referred to biannual payments for long-term employees after they reached a qualifying threshold of service with Respondent. Respondent and the Union continued to include a "Longevity Pay" article in successive collective-bargaining agreements from June 2003 through September 2009[7] (Jt. Exhs. 1-4), without any lapses in agreements between May 2001 through September 2012. (Tr. 102). In fact, the language contained in the ""Longevity Pay" articles remained virtually unchanged in these agreements, except for the 2003 Agreement, in which the parties agreed to add a separate tier of longevity pay for employees with 15 years or more seniority. (Id.).

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[7] The 2001 collective-bargaining agreement (2001 Agreement) was to remain in effect until 2004, but the parties entered into negotiations early and signed a new collective-bargaining agreement that became effective in June 2003 (2003 Agreement) through June 2006, keeping the "Longevity Pay" provision in Article 45. In the subsequent 2006 and 2009 Agreements, this provision was placed in Article 44. The 2006 Agreement was effective from August 2006 through July 1, 2009, and the last and most recent agreement became effective on July 1, 2009 (2009 Agreement). (Jt. Exhs 1-4).

The parties stipulated that pursuant to these collective-bargaining agreements, Respondent issued biannual longevity payments (in June and December)[8] to eligible unit employees from 2001 through June 2012, the month during which the most recent 2009 Agreement initially expired. (Jt. Exh. 8).

According to the current Union President, Adam Lizardi, the Union initially wanted the longevity pay provision to give senior employees an opportunity to continue to receive a raise during a time when Respondent had placed caps on annual hourly wage increases at 10 years of service.[9] (Tr. 109-111) Respondent asserted that this testimony be disregarded since Lizardi was not present during the 2001 contract negotiation meetings when the parties began to implement longevity pay language. (R Br.). However, Lizardi recalled that in 2001, union officials offered this explanation to union members when the 2001 Agreement was brought to them for a vote. He also remembered that this historical basis for longevity pay was discussed during subsequent union board meetings, of which he was a part. (Tr. 101-102, 109-111). Lizardi was credible in his presentation, and Respondent

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[8] These payments were included in either the first or second pay checks issued in June and December of each year from 2001 through June 2012. (Tr. 96-97).

[9] While Lizardi recalled a pay scale in 2001, when the Longevity Pay article was implemented, that "topped out" at 10 years, the collective-bargaining agreements effective from 2001 to 2003 and 2003 to 2006 reveal that annual wage increases were actually capped at 11 years for all Emergency Medical Technicians and Registered nurses, and at 13 years for Paramedics (i.e., caps were dependent upon employees' job classifications). (Jt. Exh. 1 pp. 50-52; Jt. Exh. 2, p. 51 and appendix A).

did not present any evidence to dispute this explanation. However, I credit this testimony for historic background only, as it is not material or critical in the determination of liability in this case. Neither Lizardi nor Ryals offered an explanation for maintaining this benefit, nor do I find one is necessary. Lizardi acknowledged, and there is no dispute, that after Respondent removed the caps on hourly wage increases[10] the parties agreed and continued to include longevity pay articles in successor agreements. (Jt. Exhs. 3, pp. 31-32; 4, p. 53). Thus, I find there is a long-standing history and practice, no matter what the reason or origin, for Respondent and the Union to agree to longevity pay provisions.

While the parties sharply disagree as to whether Respondent had an ongoing obligation to issue longevity pay after the expiration of the 2009 Agreement, neither Lizardi nor Ryals recalled any discussions among the Respondent-Union 2009 negotiations team members as to this obligation. (Tr. 109, 170)

During the trial, the parities disagreed as to whether the longevity pay was a "payment" or "bonus." Respondent made a point of referring to the payments at issue during the trial as "longevity bonuses," and in its answer as "longevity bonuses" and "longevity bonus payments." inferring a distinction between "pay" and "bonus." (GC Exhs. 1(e); Jt. Exhs. 1-4). However, Respondent did not proffer any arguments to support such a distinction. Nor did it specifically argue that longevity pay was not a mandatory subject of bargaining. Respondent did assert that these payments were separate, stand-alone events, and

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[10] See Footnote (FN) 8 above.

not an ongoing practice, and did not affect regular wages or otherwise impact future terms and conditions. (R Br., pp. 7-8). Both parties repeatedly included articles entitled "Longevity Pay" in their successive collective-bargaining agreements implemented from 2001 through 2012. (Jt. Exhs. 1-4). When asked to describe "longevity pay" or "longevity bonus," Ryals responded that "[i]t is a payment that's made to employees that have achieved ten-plus years of service . . . " (Tr. 121). He also repeatedly identified the payment as "longevity pay" during his testimony, even when questioned by Respondent's attorney. (Tr. 57, 150, 163, 166-167). It matters little to the ultimate question in this case what the parties chose to call the longevity payments. While these payments may not have been a part of regular wages or overtime pay, I find the parties agreed that they be paid to more senior employees as a type of enhancement or addition to regular wages.

2. Article 44 of the 2009 Agreement

The most recent collective-bargaining agreement became effective July 1, 2009, and remained in effect until July 1, 2012. (Jt. Exh. 4). The "Longevity Pay" provision of the 2009 Agreement in Article 44, which is at issue in this case, provided in relevant part:

> 44.1 Every December 1st and June 1st of each year of this Agreement, employees who have completed at least ten years of full-time service but less than 15 years of [full-time] service shall qualify for $100.00 for each year of continuous full-time service in excess of nine years.
>
> 44.2 Employees that have completed 15 or more years of full-time service shall receive $150.00 for

each year of continuous [full-time] service in excess of nine years, up to a semi-annual maximum of $3,000.00 and an annual maximum of $6,000.00.

44.3 Employees on industrial leave shall qualify for this payment for only the first six (6) months of industrial leave.

44.4 Payments will be made to employees who are active as of the date payment is made. Payments will be paid no longer than 30 days s after the qualifying date.

44.5 An employee must be in good standing as of the qualifying date to receive longevity pay. Good standing shall be defined as not currently on probation for prior actions, being in compliance with attendance and timeliness policies, and maintaining acceptable documentation performance during the prior six (6) month period.

(Jt. Exh. 4, p. 61 of 62).

3. Other relevant provisions of the 2009 Agreement[11]

Article 3, entitled "Duration of Agreement," Section 3.1 provided, in relevant part: "[t]his Agreement shall be considered effective July 1st, 2009 and shall remain in effect until July 1, 2012." The cover page of the 2009 Agreement contains the following: "Effective Dates: July 1st, 2009-July 1st, 2012." (Jt. Exh. 4, p. 6 of 62; p. 1 of 62).

Article 36—"Hourly Pay," Section 3.1 of this Agreement provided in relevant part:

> 36.1 Beginning with the first full pay period following the signing of this labor agreement, each active/current employee covered under this agreement will receive a 4% increase including retroactive pay for hours worked since July 1, 2009. This retro payment will be based on only hours worked in a position covered in this labor agreement.

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[11] Respondent cited to or referenced these other provisions to support its theories that the Union either agreed to a set number (six) of longevity payments during the specific term of the 2009-2012 Agreement, waiving its right to bargain, or waived its right to bargain by failing to file a grievance or unfair labor practices (ULP) charge when Respondent discontinued pay increases under Article 36 of the 2009 Agreement. These theories will be discussed in the Discussion and Analysis sections of this decision. (R. Br.).

> 36.2 Beginning with the first full pay period in July 2010, each employee covered under this agreement will receive a 2.5% increase.
>
> 36.3 Beginning with the first full pay period in July 2011, each employee covered under this agreement will receive a 3.5 % increase.

(Jt. Exh. 4, p. 53 of 62).

4. Expiration of 2009 Agreement and discontinuance of longevity pay

The 2009 Agreement expired on September 8, 2012. It initially expired on July 1, 2012, pursuant to the effective dates in the agreement, but the parties entered into three consecutive, temporary agreements to extend the 2009 Agreement through September 8, 2012. (Jt. Exh. 4, p. 6 and Jt. Exhs. 5-7). However, the parties began negotiations for a successor agreement in about March 2012, and in fact, continue to meet and negotiate for a new agreement. (Tr. 54-55, 92-93; GC Exh. 2). The parties agree to the most material facts following the expiration of the 2009 Agreement. They agree that Respondent made the last longevity payment to eligible unit employees in June 2012, and refused to continue to make these payments in December 2012 and thereafter. Respondent, through COO Ryals' testimony and stipulations, admits that it did not provide the Union with notice or an opportunity to bargain prior to the decision to discontinue longevity payments.[12] In fact, Ryals did not "believe there was

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[12] The parties also stipulated had Respondent issued longevity pay pursuant to the formula set forth in the 2009 Agreement, payment would have totaled $87,150 to 138 bargaining unit employees. (Jt. Exh. 8).

any need for [Respondent] to notify them" He asserted that "[t]he plain language of the CBA that was expired, there was no continuing process that I would notify them about." (Tr. 59-60; 166; Jt. Exh. 8).

Although questioned at length as to who made the decision to discontinue longevity pay, and with whom he discussed the decision, it is evident from Ryals' undisputed, unwavering testimony that he made the decision to terminate longevity pay after the 2009 Agreement expired, and that Respondent sanctioned this decision. (Tr. 56-60). Ryals did not, however, inform the Union of his decision until December 3, 2012, when Lizardi contacted Respondent's Payroll Manager, Cassandra Collins[13] via email, to ask if the "longevity checks would be in the next check or the one after[.]" Collins initially responded "'"[t]he one after," but 13 minutes later, emailed the following: "Sorry, but from what I understand we won't be paying any longevity yet." She then clarified that "the company is not planning on paying longevity" Lizardi forwarded these emails to the Union Treasurer, Kevin Burkhart. (GC Exh. 4). (GC, Exh. 4). Kevin Burkhart subsequently asked Ryals "to do the right thing,"[14] and issue the longevity pay, but Ryals denied the request. (Tr. 57, 60; Jt. Exh. 8).

I credit Lizardi's undisputed testimony that he and one or more of his other Union officials contacted Respondent

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[13] Collins normally administered the actual payments as directed by Respondent. She did not make decisions as to whether or not payments would be issued. (Tr. 73-77).

[14] Ryals did not specifically recall this conversation with Burkhart, but admitted that "Kevin says things like that, it wouldn't be out of character for him." (Tr. 60).

almost immediately after he received word from Collins that the longevity benefit would not be paid. They inquired as to the reason why it was not paid. As previously stated, Respondent admits that it refused to honor this request or give the Union an opportunity to bargain over its decision not to make longevity payments.

Ryals recalled that he verbally communicated his decision to stop longevity pay to his managers and other company executives, and that no one disagreed. (Tr. 57, 139-140). The only email produced regarding written communication to other managers/officials was dated September 11, 2012, and entitled "Local I-60 Negotiations Update." While it confirmed that the parties were still working together to negotiate a new agreement after the 2009 contract expired, it did not mention longevity pay, or other specific provisions in the 2009 Agreement. It did state in pertinent part:

Managers:

> By now you have all heard that the contract with Local I-60 has expired and the company did not extend the contract. This is true. . . .
>
> . . we agreed to begin negotiations in March, well before the June expiration date of the existing contract .
>
> Much to the Company's surprise, during our first negotiation session on March 27th, the Union announced that they wanted to completely scrap all articles in the existing contract, which took literally hundreds of hours to negotiate over the years, and start over. . . .
>
> The Company has negotiated in good faith and, as such, extended the existing contract twice. The

> Company did not feel that continued extension of the contract would result in any improvements in the negotiations process. Thus, the Company declined to take such action. Obviously the process is taking longer than anyone wants, but a lot of progress has been made. We are optimistic that we will be able to reach Agreement in a timely manner on the remaining outstanding articles.
>
> Now what does this all mean to you and how you manage your direct reports? The answer is, pretty much nothing.
>
> Wages benefits and working conditions remain unchanged. The disciplinary process remains unchanged. The disciplinary process remains unchanged at your level. All policies, procedures, and standard operating procedures remain unchanged.
>
> In other words, it is business as usual . .
>
> While there are a few changes that the Law allows, like the ability of the Union to Strike and the ability of the Company to Lock Out the workforce, no one is even contemplating strikes or lockouts that I am aware of. Again, your responsibility is to perform business as usual.[15]

(GC Exh. 2; Tr. 150-151).

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[15] It appears from this correspondence to managers, that Ryals may not have made his decision to discontinue longevity payments as of September 11, 2012 (3 days after the expiration of the Agreement). His testimony indicates that he probably made his decision in November 2012 or before the time that longevity pay historically being paid out to someone. (Tr. 57).

In August 2012, prior to the expiration of the 2009 Agreement, the parties reached a tentative agreement (TA)[16] to retain a longevity pay provision in the new or successor agreement that would remain identical to the Article 44 of the 2009 Agreement. (Tr. 55-56; 95-97).

Ryals testified that he drafted the longevity language in the collective-bargaining agreements from 2001 through 2009. (Tr. 123, 124). He explained that his understanding of what Respondent committed to in Article 44 of the 2009 Agreement was that "longevity pay would be paid out on the two dates specified, which were. . . . July and December of each year that the agreement [went] into effect. When the agreement was no longer in effect, the company had no obligation, and nor would [he] believe the plain language indicates that payment [would continue]." He asserted that the Company believed it was agreeing to only "a total of six payouts for longevity," and those were the only payments made throughout the course of the 2009-2012 Agreement. (Tr. 165-166). Clearly, the Union has a different understanding as to what would occur after the expiration of the 2009 Agreement. I find that this is a legal dispute rather than a factual one, and that the 2009 Agreement was silent as to what would happen to the longevity provision in the event it expired. Respondent refused to stipulate that the parties had not discussed with each other their postexpiration expectations for the 2009 Agreement, either during negotiating sessions or otherwise, leading up to the 2009 contract.

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[16] Both Ryals and Lizardi explained that a TA occurs when both negotiating parties to a new or successor agreement agree to the language of a particular provision, pending approval of a final collective-bargaining agreement. (Tr. 55-56; 95-97).

However, it is uncontested that neither Lizardi nor Ryals could recall any discussions among the parties' negotiating team members regarding what would happen to the biannual longevity payments if the 2009 Agreement expired without a successor agreement in place.[17] (Tr. 109-110, 170). Thus, I find the parties did not discuss or come to an agreement, nor include in any agreement, what would occur to longevity pay once the 2009 Agreement expired.

DISCUSSION AND ANALYSIS

Legal Standards

1. Threshold issue is whether a determination of the merits should be deferred to a Grievance and Arbitration Process?

I will first address Respondent's assertion that it may be appropriate to defer my decision in this case to an arbitrator pursuant to the 2009 Agreement's Grievance and Arbitration Procedures. Respondent relies on the holding in *Nolde Bros., Inc. v. Bakery Workers Local 358*, 430

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[17] There was a lot of trial discussion as to whether or not Ryals or Tuesday Kramer took and kept bargaining session notes regarding longevity pay discussions. Ryals asserted that he nor Kramer had any such notes. On the other hand, Lizardi observed that in most meetings, Kramer appeared to be taking notes on her laptop, but he could not recall if she took notes during longevity pay discussions. (Tr. 94-95). I tend to credit Lizardi's observations over Ryals' rather unequivocal, vague testimony that "[s]he's been there, she takes notes some of the time [s]ome of the time, she does not." (Tr. 48). Since Kramer was not called by either party to settle this dispute, and neither Ryals nor Lizardi could recall specific discussions about longevity pay, other than in sessions for the new contract, this matter is not relevant or critical to the decision in this case.

U.S. 243 (1977). (Tr. 22; GC Exh. 1(e); Jt. Exh. 4, pp. 37-41;)[18] Respondent asserted, at the trial and in its answer, that if the Agency alleges that it violated the collective-bargaining agreement, then any right that arises under the contract is arbitral, regardless of whether the contract has expired. (Tr. 22). As the Agency pointed out in its Brief,[19] the Board has long recognized the appropriateness of deferring certain unfair labor practice charges in cases where a union and employer have active grievance and arbitration procedures in place. *See In Re Univ. Moving & Storage Co.*, 350 NLRB 6, 20 (2007), citing *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984) (the Board reaffirmed and bolstered its doctrine in *Collyer Insulated Wire*, supra).

Under *Collyer Insulated Wire*, supra, and *United Technologies Corp*, supra at 558, deferral is appropriate when:

> . . . the dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity [or 'enmity'] to the employees' exercise of protected rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve

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[18] In its answer, and at trial, Respondent asserted this deferral argument as an affirmative defense, but did not address it in its Brief. (R. Br.). However, since Respondent has not officially abandoned this affirmative defense, it is appropriate to address it as a threshold issue before deciding the merits of the unfair labor practice issue.

[19] R. Br. pp. 11-12.

> the dispute; and the dispute is eminently well suited to such resolution [by arbitration].

Univ. Moving & Storage Co., 350 NLRB 6, 20 (2007). In the instant case, the parties had a long and productive collective-bargaining relationship, with no claim of employer animosity, as evidenced by the successive agreements and on-going negotiating towards a new agreement. However, this case does not pass the *Collyer Insulated Wire* test, in that the 2009 Agreement does not encompass the dispute at issue. In fact, as discussed further here, the 2009 Agreement specifically stated that the arbitration clause would not survive the Agreement

In *Nolde Bros., Inc. v. Bakery Workers Local 358*, 430 U.S. 243 (1977), the Supreme Court held that when the parties have agreed to arbitrate grievances arising under a collectivebargaining contract, that obligation is presumed to continue once the contract has expired. In a subsequent case, the Supreme Court clarified its holding in *Nolde, Bros., Inc.*, supra, stating that "*Nolde Brothers, supra*, 430 U.S. at 255 ... found a presumption in favor of postexpiration arbitration of disputes unless negated expressly or by clear implication so long as such disputes arose out of the relation governed by the contract." *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 191-192 (1991).

The facts in *Nolde Brothers* are easily distinguished from this case. First, the case involved a suit to compel arbitration under the arbitration provisions of an expired collective-bargaining agreement, which, unlike the arbitration in the instant case, was silent regarding postexpiration grievances or arbitration. The union alleged the employer was obligated to arbitrate its refusal to pro-

vide severance pay, under the expired agreement, to displaced employees who had worked for the company for at least 3 years. The employer argued that its obligation to arbitrate (and pay the displaced employees) died with the contract because the event leading to displacement and giving rise to the dispute—the closing of the plant—occurred after the expiration of the contract. The Court held that "[t]he dispute . . . although arising after the expiration of the collective-bargaining contract, clearly arises under that contract." *Nolde*, supra at 249. The Court observed that parties had agreed in the expired contract's arbitration clause to attempt to resolve "all grievances," but that the contract was silent as to post-expiration grievances. It held that " . . in the absence of some contrary indication, there are strong reasons to conclude the parties did not intend their arbitration duties to terminate automatically with the contract." *Nolde Brothers* at 253. The Court concluded "[i]n short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication." *Nolde Brothers*, supra at 255.

In *S & W Motor Lines*, 236 NLRB 938 (1978), the Board adopted the position that the arbitration provision did not survive contract expiration because the *Nolde* presumption favoring arbitrability of postexpiration disputes had been negated by express language in the contract. Unlike the contract in *Nolde*, but like the contract in *S & W Motor Lines*, supra, the expired 2009 Agreement in this case explicitly states that the parties' grievance and arbitration procedure "does not survive the term of this

Agreement." (Jt. Exh. 4, p. 37).[20] Therefore, I find no basis upon which to defer the merits of this case to arbitration where the parties clearly decided that arbitration would not survive the contract. Furthermore, the parties to this expired 2009 Agreement "have no contractual obligation to adhere to the agreement's arbitration procedure in processing grievances arising after the agreement's arbitration date." See *W. H. Froh, Inc.*, 310 NLRB 384, 386 (1993), citing *Indiana & Michigan Elec. Co.*, 284 NLRB 53, 57 (1987) and *Hilton-Davis Chemical Co.*, 185 NLRB 241, 242 (1970).[21]

2. Discontinuance of longevity pay after expiration of the 2009 Agreement

Mandatory subject of bargaining

First, I find that longevity pay, as described in Article 44 of the 2009 Agreement, as well as the three predecessor agreements, is clearly a mandatory subject of bargaining.[22] The Board has recognized longevity pay as a

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[20] The Board has consistently recognized that the parties generally do not have an obligation to adhere to the terms of an expired arbitration agreement. See *Indiana & Michigan Elec. Co.*, 284 NLRB 53, 57 (1987) (the Board reaffirmed its view that "the arbitration commitment arises solely from mutual consent. Congress did not intend the [NLRA] to create a statutory duty to arbitrate," and recognized deferral of charge to be inappropriate where grievances were triggered by events occurring after the expiration of contacts.").

[21] The Board in *W. H. Froh, Inc.*, supra at 386, fn.5, noted that *Hilton-Davis* has been cited with approval by the Supreme Court in *Litton Fin. Printing Div. v. NLRB.*, 501 U.S. 190 (1991).

[22] While Respondent does not assert that longevity pay is not a mandatory subject of bargaining, at trial, it insisted on characterizing longevity pay as a "longevity bonus" or "bonus," rather than

mandatory subject of bargaining. In *Pine Brook Care Ctr., Inc.*, 322 NLRB 740, 748 (1996), the Board adopted the Administrative Law Judge's findings which including a finding that certain benefits, including "longevity pay," constituted terms and conditions of employment which were "clearly" mandatory subjects of bargaining. Additionally, whether described as a "longevity bonus" of "longevity pay," I find Article 44 describes a payment to eligible senior employees which constitutes a mandatory subject of bargaining.

Unilateral change violation

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees;" and has culminated into a longstanding rule that an employer violates Section 8(a)(5) if it "unilateral[ly] change[s] conditions of employment under negotiation . . . , for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Furthermore, it is well settled that the unilateral change doctrine set forth in *NLRB v. Katz*, supra, whereby an employer violates the NLRA if it effects a unilateral change of an existing term or condition of employment, without bargaining to impasse, extends to cases in which an existing agreement

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agreeing that it is the same as "longevity pay." However, as I found earlier in this decision, Article 44, drafted by Ryals, and approved by the Union, is entitled "Longevity Pay," and both parties have certainly referred to benefit as a "bonus" or "pay" interchangeably throughout these proceedings. Nevertheless, no matter what they call it, it is clearly an economic benefit flowing from the relationship between the employer and unit employees, and a mandatory subject of bargaining as discussed here.

has expired and negotiations on a new one are pending. See, *e.g.*, *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544, n.6 (1988), *Litton Fin. Printing Div. v. NLRB.*, 501 U.S. 190, 191-192 (1991). Therefore, an employer's duty to maintain the status quo remains the same, during negotiations, when both the Union and employer have agreed to a particular term or condition of employment in a collective-bargaining agreement which has expired. *The Finley Hospital*, 359 NLRB No. 9 (2012) at 2, citing *Litton*, supra at 198; *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, supra.

An employer may escape liability for a unilateral change violation if it proves that a union has expressed or implied a "clear and unmistakable waiver" of its right to bargain. *American Broadcasting Co.*, 290 NLRB 86, 88 (1988); *California Pacific Medical Center*, 337 NLRB 910 (2002).

The Board has relied upon several factors in assessing whether a clear and unmistakable waiver exists: (1) language in the collective-bargaining agreement, (2) the parties' past dealings, (3) relevant bargaining history, and (4) other bilateral changes that may shed light on the parties' intent. See *Johnson-Bateman*, 295 NLRB 180, 184-187 (1989); *American Diamond Tool*, 306 NLRB 570 (1992). The party asserting the waiver, however, bears the burden of establishing the existence of the waiver. *Pertec Computer*, 284 NLRB 810 fn. 2 (1987).

Respondent, from the offset, does not raise the customary defense that the Union waived its right to bargain. Rather, Respondent asserts that the waiver doctrine is irrelevant in this case because it never changed existing terms and conditions of employment. In fact, Respond-

ent even argues that "longevity bonuses" were not an ongoing practice, "but were limited by both parties in the 2009 Agreement to a fixed number of payments (six) on specified dates which "'expired of [their] own accord" once they were made.[21] Respondent contends that this calculated expiration did not constitute a "change," nor create an obligation to bargain, because Respondent made all longevity payments required by the expired 2009 Agreement. Respondent does argue, alternatively, that if I apply the "clear and unmistakable waiver" doctrine, Respondent's obligation would be satisfied much for the same reasons, i.e., that it met its obligation once the sixth payment was made. Respondent also avers, alternatively, that the Union implicitly waived its right to bargain when it failed to grieve or file a charge in connection to Respondent's termination of wage increases under Article 36 of the 2009 Agreement. It relies heavily its interpretation of Union President Adam Lizardi's testimony. (R Brief).

First, I have considered all of Respondent's arguments as to why its actions did not constitute a "change" or "unilateral change," and find they are unsupported by the case law and merits. Pursuant to *Katz*, supra, and its progeny cited here, Respondent effected a unilateral

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[21] Respondent made the last longevity payment in June 2009, prior to the expiration date of the longevity agreement. I must reject, however, this questionable assertion that longevity payments were not an ongoing practice. This belies the undisputed evidence that Respondent and the Union have in fact continued the practice of including longevity pay provisions in its collective-bargaining agreements since 2001. Furthermore, there is no language in the 2009 Agreement to even infer that issuance of biannual longevity payments was a one-time or occasional practice.

change of an existing term or condition of employment, without bargaining to impasse. This rule, as set forth above, has been extended to cases such as the instant case, in which an existing agreement has expired and negotiations on a new one are pending. See, *e.g.*, *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, supra at 544, n.6 (1988); *Litton Fin. Printing Div. v. NLRB*, supra at 191-192. There is simply no dispute in this case that Respondent changed a term and condition of employment pending negotiations for a new contract.

Next, I find there is clearly no express waiver encompassed in the 2009 Agreement, and reject Respondent's assertion that the language in the Longevity Pay Article 44, i.e., "Every December 1st and June 1st of each year of this Agreement . . . ," coupled with effective dates of the contract, represents the Union's express or implied waiver, much less a "clear and unmistakable" waiver of its bargaining rights. The Board rejected similar language in *Finley Hospital*, supra at 1, in which it found the respondent violated Section 8(a)(5) of the Act by unilaterally discontinuing the annual 3-percent pay raises provided in the parties collective-bargaining agreement upon expiration of the agreement. The Board applied the "clear and unmistakable waiver" standard in that case, requiring parties to "unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Finley Hospital*, supra at 2, citing *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-812 (2007).

The respondent in *Finley Hospital*, as in this case, relied on the multiple references, in the collective-bargaining agreement provision at issue, to the term of the agreement, i.e., "During Term of the Agreement," "For the duration of this Agreement," and "during the term of this Agreement." The Board found that while such references might limit the contractual obligation and right for any period after the contract expiration, "these references fail to "unequivocally and specifically express [the parties'] mutual intention to permit unilateral employer action with respect to the [annual wage increases]." The Board recognized that neither the wage increase provision, nor the agreement as a whole, provided for any postexpiration action or conduct, "" . . . much less expressly permit[ted] unilateral employer action" upon the expiration of the agreement. *Finley Hospital*,, supra at 3, citing *Provena*, supra at 811.

Prior to Finley Hospital, the Board consistently reached this same result its cases involving postexpiration changes in terms and conditions established by an expired agreement. See *AlliedSignal Aerospace*, 330 NLRB 1216, 1216-1222 (2000), review denied sub nom. *Honeywell International v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001) ("[w]hatever the scope of the [r]espondent's obligation as a matter of contract, there is no basis for finding the [u]nion waived its [statutory] right to continuance of the status quo as to terms and conditions . . . after contract expiration); *General Tire & Rubber Co.*, 274 NLRB 591, 592-593 (1985), enfd. 795 F.2d 585 (6th Cir. 1986) (Board found the contract did not address employer's statutory obligation to pay benefits postexpiration of a contractual benefit continuation period, and therefore did not constitute a waiver of the union's rights). The Board in this

case distinguished *Finley Hospital* from Board decisions which found a "clear and unmistakable," because the contracts in those cases included postexpiration language. See *Cauthorne Trucking*, 256 NLRB 721 (1981), granted in part, denied in part 691 F.2d 1023 (D.C. Cir. 1982); *Oak Harbor Freight Lines*, 358 NLRB No. 41 (2012).

The contract language in the instant case, like that in *Finley Hospital*,[24] and the other Board cases cited there, *AlliedSignal* and *General Tire*, sets limits on the effective periods of the contractual obligation, but fails to provide for the employer's postexpiration conduct or obligation or authorize unilateral changes by the employer. Respondent contends *Finley Hospital* is factually apposite from this case because the longevity payments provided in this case's 2009 Agreement were "separate, stand-alone [events] timed to occur on specific dates, and were not ongoing [practice] like the wage increases in *Finley Hospital*." This argument is completely unsupported by the evidence, as discussed earlier. The longevity payments in the instant case were not "stand-alone" or "separate" events. Rather, they were consistent payments issued biannually in several successive agreements

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[24] I have considered, and dismiss, Respondent's argument that Finley Hospital should not be considered by me because it was decided by an improperly constituted Board, citing *Noel Canning v. NLRB*, supra, and *New Vista Nursing & Rehab.*, 2013 U.S. App. LEXIS 9860 (3d Cir. May 16, 2013). As decided earlier on in this decision, I find this argument is without merit, as the Board is not bound by these decisions. It has rejected this argument, as the issue regarding the validity of recess appointments is pending litigation and ""definitive resolution." I note, as well, that the Board in Finley did not make decisions of first impression, but relied on well-settled Board and Court decisions.

between Respondent and the Union from 2001 through 2012. In fact, while not at issue here, the parties admitted they agreed to a tentative agreement (TA) to continue to maintain the longevity payments in a successor agreement. Therefore, I find the employer in this case has not shown a clear and unmistakable waiver, of any kind, of its obligation to maintain the status quo created in the expired 2009 Agreement, and has therefore violated Section 8(a)(5) and (1) of the Act.

Respondent also argues that *Finley Hospital* is based on reasoning that has been rejected by the D.C. Circuit, and therefore should not be treated as binding or persuasive "in any sense." See *NLRB v. USPS*, 8 F.3d 832, 838 (D.C. Cir. 1993); *Enloe Medical Ctr. v. NLRB*, 433 F.3d 834, 837 (D.C. Cir. 2005). (R Br., p. 7, fn.2). The D.C. Circuit Court of Appeals rejected the Board's "clear and unmistakable" waiver doctrine in those cases, implementing instead, its own "waiver" vs. "covered by" doctrine.[25] While the Board is not bound by the findings in these cases, as evidenced in its findings in *Finley Hospital*, I find that even applying the D.C. Court of Appeals doctrine here, Respondent's argument is without merit, and my decision ecision remains the same. The Court of Ap-

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[25] Held that "questions of 'waiver' normally do not come into play with respect to subjects already covered by a collective bargaining agreement," citing *NLRB v. USPS*, supra at 836-837. Instead, the proper inquiry is ""simply whether the subject that is the focus of the dispute is 'covered by' the agreement." Id at 836. Also see *Dept. of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992). Unlike the subject matter in dispute in the D.C. Circuit Court of Appeals cases cited here, I find termination of longevity pay and the refusal to bargain over the same was not "covered by" the 2009 Agreement.

peals found in both cases that the companies' actions, including implementation of changes and refusal to bargain over the effects of those changes, were sanctioned by agreed-upon, existing collective-bargaining agreements. See *NLRB v. USPS*, supra at 834, 837; *Enloe Medical Ctr.*, supra at 837. The instant case is distinguishable in that the 2009 Agreement was not an existing agreement, and the 2009 Agreement's Management Rights clause or other provisions did not so authorize or "sanction" Respondent to discontinue longevity pay, and refuse to bargain. (Jt. Exh. 4, pp. 8-9 of 62). Thus, the D.C. Circuit Court's waiver approach is not inapposite to this case, and I still find the Union in the instant case did not waive its bargaining rights.

Likewise, I reject the notion that the Union implicitly waived its right to bargain over the termination of longevity pay because it did not challenge, but rather, accepted limitations on hourly wage increases in Article 36 of the agreement. Article 36 of the 2009 Agreement provides for annual percentage increases in hourly pay beginning with the first full pay period following the signing of the agreement, and thereafter, beginning with the first full pay period in July 2010 and July 2011, for each "active/current employee covered under this agreement." Lizardi acknowledged that the Union did not take issue with this provision since it set forth specific dates and years for the increases and termination thereof. I agree, and so find, that the language in this provision is distinguishable from Article 44, in that it specifically terminated hourly wage increases 1 year before the contract ended. Notwithstanding my finding, the Board has rejected "waiver-by-inaction defense, finding the Union must have clear notice of the employer's intent to insti-

tute a change. *Rappazzo Elec. Co.*, 281 NLRB 471, 482 (1986).

I therefore conclude that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing longevity pay without first having afforded the Union notice and an opportunity to bargain. I further conclude that Respondent violated Section 8(a)(1) of the Act by notifying the Union, after the fact, of its decision that it would not be issuing longevity pay.

CONCLUSIONS OF LAW

1. SW General, Inc. d/b/a Southwest Ambulance (the Company) is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act and is the recognized collective-bargaining representative of a bargaining unit composed of the production, maintenance, clerical, technical, and office employees employed by the Company at its facility in Mesa, Arizona.

3. On or about December 1, 2012, and thereafter, the Company violated Section 8(a)(5) of the Act by failing to give notice and an opportunity to bargain with the Union prior to unilaterally terminating longevity payments for all eligible unit employees after the most recent expiration of the 2009 collective-bargaining agreement on September 8, 2012.

4. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall order it to cease and desist from such conduct and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully and unilaterally terminated longevity payments, and failed to distribute them to eligible unit employees as required by the parties' July 1, 2009 through July 1, 2012 contract, as extended to September 8, 2012, I shall order it to make whole for any loss of earnings or benefits suffered as a result of said unilateral change. Backpay shall be computed in accordance with *F W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily under *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate the affected employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay award award(s) covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB No.44 (2012).

On these findings of fact and conclusions of law, and on the entire record here, I issue the following recommended[26]

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[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Company, SW General, Inc. d/b/a Southwest Ambulance, in Mesa, Arizona, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Unilaterally terminating unit employees' longevity pay benefits without first notifying the Union and affording it an opportunity to bargain concerning such change and its effects.

(b) In any like or related manner interfering with, restraining, or coercing Employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Rescind the unilateral material change to longevity pay implemented in December 2012, as it relates to discontinuing longevity payments every June 1st and December 1st of every year and maintain those terms, as set forth in the most recent collective-bargaining agreement between Respondent and the Union effective from July 1, 2009 through July 1, 2012, and extended by further agreements until September 8, 2012, and maintain those terms in effect until the parties have bargained and agreed to material changes and/or until the parties have agreed upon and implemented a new collective-bargaining agreement, or until Respondent has bargained to a good-faith impasse with the Union regarding longevity pay.

(b) Make any unit employees and former unit employees whole by reimbursing them for longevity pay, with interest as prescribed in *New Horizons for the Retarded*, 283

NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), for any loss of benefits suffered as a result of the unilateral implemented changes to longevity pay.

(c) Within 14 days after service by the Region, post at its Mesa, Arizona facility, and Respondent's Southwest Emergency Medical Services Group's facilities, if any, in Maricopa, Pinal, Pima and Graham Counties, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since December 1, 2012.

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[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated at Washington, D.C. Aug. 8, 2013

Donna N. Dawson
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

*1 The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally implement material, substantial, and significant changes to our employees' longevity pay without providing the Union notice and an opportunity to bargain.

WE WILL rescind the unilateral material change to discontinue longevity pay implemented in December 2012, as it relates to elimination of biannual longevity pay to eligible unit employees consistent with Article 44 of the collective-bargaining agreement, effective from July 1, 2009 through July 1, 2012 and extended through September 8, 2012 for all affected bargaining unit employees and former unit employees.

WE WILL, if requested by the Union, bargain in good faith over any material change in the eligibility of employees or former employees with 10 or more years of full

time service with Respondent as of December 1, 2012 and thereafter, and if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make whole, with interest, any current or former unit employee affected by the termination of longevity pay as of December 1, 2012, and thereafter, for any loss of earnings and other benefits suffered as a result of the unlawful unilateral change made to longevity pay.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Federal law.

SW GENERAL, INC. D/B/A SOUTHWEST AMBULANCE

(Employer)

Dated: _____ **By:** .....

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Resident Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay Street, Suite 300N, Oakland, CA 94612-5224

510-637-3300 Hours: 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 510-637-3253

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2015
NLRB-28CA094176

No. 14-1107
Consolidated with 14-1121

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Filed on Jan. 20, 2016

ORDER

BEFORE: HENDERSON, SRINIVASAN, and WILKINS, Circuit Judges

Upon consideration of respondent's petition for panel rehearing filed on October 5, 2015, and the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ _____
KEN R. MEADOWS
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2015
NLRB-28CA094176

No. 14-1107
Consolidated with 14-1121

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Filed on Jan. 20, 2016

ORDER

BEFORE: GARLAND, Chief Judge; HENDERSON, ROGERS, TATEL, BROWN*, GRIFFITH, KAVANAUGH*, SRINIVASAN, MILLETT*, PILLARD**, and WILKINS, Circuit Judges

The National Labor Relations Board's petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter a majority of the judges eligible to participate did

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* Circuit Judges Brown, Kavanaugh, and Millett would grant the petition.

** Circuit Judge Pillard did not participate in this matter.

not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ _____
KEN R. MEADOWS
Deputy Clerk

APPENDIX F

5 U.S.C. 3345 provides:

Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or em-

ployee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

No. 15-1251

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SW GENERAL, INC.,
DOING BUSINESS AS SOUTHWEST AMBULANCE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 3345(b) of the Federal Vacancies Reform Act, 5 U.S.C. § 3345, *et seq.*, limits when a permanent nominee for a vacant office may also serve temporarily as the acting official. The question presented is whether that limitation applies to all temporary officials serving under 5 U.S.C. § 3345(a), or whether it is irrelevant to officials who assume acting responsibilities under Subsections (a)(2) and (a)(3).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding below are identified in the caption to the case.

Respondent SW General, Inc., d/b/a Southwest Ambulance, is a wholly owned subsidiary of Rural/Metro Corporation. Rural/Metro Corporation is a wholly owned subsidiary of American Medical Response, Inc., which is a subsidiary of Envision Healthcare Corporation. Envision Healthcare Corporation is a subsidiary of Envision Healthcare Holdings, Inc., a publicly held company (NYSE: EVHC). No other publicly held corporation owns 10% or more of Respondent's stock.

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Hooks v. Kitsap Tenant Support Servs., Inc., No. C13-5470, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013) 15

Hooks v. Remington Lodging & Hospitality, LLC, 8 F. Supp. 3d 1178, 1187 (D. Alaska 2014) 15

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159 Cong. Rec. S17 (daily ed. Jan. 3, 2013) 9

Black's Law Dictionary (10th ed. 2014) 20

Black's Law Dictionary (6th ed. 1990) 16

Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177 (2001) 18, 23

Guidance on the Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60 (1999) 18, 22

H. Comm. on Oversight & Gov't Reform, 112th Cong., Policy and Supporting Positions app. 1 (Comm. Print 2012) 26

TABLE OF AUTHORITIES
(continued)

Page(s)

Letter from Carlotta C. Joyner, Director, Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R (Feb. 23, 2001), http://www.gao.gov/assets/80/75036.pdf 22

Merit Systems Protection Board, *In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees Outside the Federal Government* (2008), *available at* http://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=323118 26

Morton Rosenberg, Cong. Research Serv., 98-892, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* (1998) 5

Oxford English Dictionary (2d ed. 1989) 20

S. Rep. No. 105-250 (1998) ..... *passim*

Stephen M. Shapiro, et al., SUPREME COURT PRACTICE 241 (10th ed. 2013) 13

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INTRODUCTION

The Appointments Clause of the Constitution requires that many government posts be filled by persons who are nominated by the President and confirmed by the Senate. Art. II, § 2, cl. 2. There are more than a thousand of these so-called PAS positions. When a vacancy arises due to an appointee's death, resignation, or inability to perform the job, the Constitution requires the President to obtain the Senate's advice and consent to a new appointee. Nevertheless, for decades, Presidents from both parties circumvented the Senate's advice-and-consent role by directing their chosen replacements to serve indefinitely in an acting capacity, rather than nominating them for Senate approval. Congress enacted the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. § 3345 *et seq.*, to combat that problem.

The FVRA allows the President to appoint an acting officer to function temporarily as a caretaker—but subject to carefully circumscribed limits on who may serve in this capacity and for how long. One such limitation, the provision at issue here, generally prevents the same person from serving as an acting official while also being the permanent nominee. That limitation makes sense: Congress did not want the President to install his chosen replacement unless the Senate approved. Allowing the permanent nominee to begin work immediately as an acting official would enable the President to advance his agenda without obtaining the Senate's advice and consent. And with his chosen replacement at the helm anyway, the President would have every incentive to delay submitting a nomination.

The FVRA does contain a narrow exception to the prohibition on acting service by the permanent nominee. The exception is for nominees who have sufficient experience as first assistants to the vacant office or who have themselves been appointed by the President and confirmed by the Senate as first assistants. That is because these individuals are the quintessential competent caretakers, and their appointment to the vacant office is unlikely to prompt the sort of change in direction for the agency that acutely implicates the Senate's advice-and-consent function.

The Government seeks to create an additional exception. It claims that any of the potentially thousands of GS-15 employees within the same agency, or any of the hundreds of PAS officials in wholly unrelated offices in other agencies, may also serve as acting officials even when nominated for the permanent position.

The D.C. Circuit correctly rejected the Government's interpretation of the FVRA, and its decision does not warrant this Court's intervention. Every court that has considered the question presented agrees that the FVRA is clear. Although the Government insists that the issue is important, it identifies only 14 officials over the FVRA's 18-year history whose actions are even arguably implicated by the decision below. This Court does not sit to review splitless questions of limited significance. The petition for certiorari should be denied.

STATEMENT

A. Statutory Background

The FVRA protects the Senate's constitutionally mandated role in the appointment of "Officers of the United States." U.S. Const. art. II, § 2, cl. 2; *see* Pet. App. 4a. Specifically, the Appointments Clause provides that such officers "shall" be nominated by the President "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. In the decades leading up to the FVRA's enactment, Presidents from both political parties had circumvented the Senate's role by directing their chosen replacements to perform the functions of a vacant PAS position in an acting capacity, rather than nominating them. Congress enacted the FVRA to reclaim its role in the appointments process.

1. The advice-and-consent requirement of the Appointments Clause is a "significant structural safeguard[]" intended to "curb Executive abuses of the appointment power and to promote a judicious choice of persons for filling the offices of the union." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (internal quotation marks and citations omitted); *see also N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014). Although the President alone has the power to nominate officers of the United States, the Constitution also requires Senate approval. U.S. Const. art. II, § 2, cl. 2; *see Noel Canning*, 134 S. Ct. at 2559. In other words, "[t]he president's duty is to submit nominees for offices to the Senate, not to fill those offices himself." S. Rep. No. 105-250 at 5 (1998).

Recognizing that vacancies can occur unexpectedly and that confirmation takes time, Congress has long

given the President limited power to appoint acting officials to serve temporarily without first obtaining the Senate's approval. *See* Pet. App. 2a-3a (citing Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281; Act of July 23, 1868, ch. 227, 15 Stat. 168); *see also* 144 Cong. Rec. S6413 (daily ed. June 16, 1998) (statement of Sen. Thompson). The FVRA's predecessor, the Vacancies Act, restricted the pool of individuals the President could appoint to act temporarily and limited the time they could serve. *See* 5 U.S.C. §§ 3345-3348 (1988) (limiting acting official to first assistant or person holding PAS position within the administration, and setting 120-day limit on service).

But the limitations in the Vacancies Act were ineffective. The Vacancies Act said nothing about the validity of actions taken by acting officials who had served in violation of the statute. *See id.* §§ 3345-3349. Moreover, courts held that a subsequent official who was properly appointed could ratify the prior actions of an improperly appointed acting officer. *See Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 214 (D.C. Cir. 1998). And some administrations claimed that certain agencies retained discretion to appoint acting officials without regard to the Vacancies Act at all. *See* S. Rep. No. 105-250 at 3.

Presidents from both parties took advantage of these loopholes to put their chosen replacements to work as long-term acting officials without requesting (much less obtaining) Senate approval. For example, as of May 1997, "almost all of the top positions at the Justice Department were being filled in an acting capacity," including "the Associate Attorney General, Solicitor General, Assistant Attorney General for

Civil Rights, Assistant Attorney General for the Criminal Division, and Assistant Attorney General for the Office of Legal Counsel." 144 Cong. Rec. S11028 (daily ed. Sept. 28, 1998) (statement of Sen. Thurmond). Many of these acting officials served for years before the President submitted a nomination. *See* S. Rep. No. 105-250 at 3 (Acting Solicitor General served for over a year before any nomination was submitted); 144 Cong. Rec. S11028 (statement of Sen. Thurmond) (Acting Assistant Attorney General of the Criminal Division served for two and a half years before any nomination was submitted); *see also* 144 Cong. Rec. S11022 (statement of Sen. Thompson) (Acting Director of Office of Thrift Supervision "served for 4 years without a nomination for the position ever having been submitted to [the Senate]"). As of 1998, approximately 20% of PAS positions in Executive departments were being filled by "temporary designees, most of whom had served well beyond the 120-day limitation period of the [Vacancies] Act without presidential submissions of nominations." Morton Rosenberg, Cong. Research Serv., 98-892, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* 1 (1998); *see* S. Rep. No. 105-250 at 5; *see also* 5 U.S.C. § 101 (listing the 15 Executive departments).

As a result, "acting officials who ha[d] not received the advice and consent of the Senate [were] run[ning] the Government indefinitely." 144 Cong. Rec. S11022 (statement of Sen. Thompson); *see also* 144 Cong. Rec. S11024 (statement of Sen. Byrd); 144 Cong. Rec. S11027 (statement of Sen. Levin). "Such a scheme obliterate[d] the constitutional requirement that the officer serve only after the Senate confirms the

nominee." S. Rep. No. 105-250 at 7. And it undermined a core premise of the Appointments Clause, that "[t]he government's important functions should be carried out by permanent officials." 144 Cong. Rec. S6414 (statement of Sen. Thompson).

2. Congress enacted the FVRA to stop these Executive "runaround[s] of" the Appointments Clause. 144 Cong. Rec. S11030 (statement of Sen. Byrd); *see* S. Rep. No. 105-250 at 5.

The FVRA "establish[es] a process that permits the routine operation of the government to continue, but that will not allow the evasion of the Senate's constitutional authority to advise and consent to nominations." 144 Cong. Rec. S6414 (statement of Sen. Thompson). To that end, the FVRA permits certain individuals to temporarily perform the duties of a PAS position in an acting capacity, but imposes limitations on who may do so. *See* 5 U.S.C. § 3345. It further restricts the length of time such an official may serve. *See id.* § 3346. It encourages the President to submit timely nominations by extending those time limits when a nomination is pending, and extinguishing the acting officer's authority if a nomination is not submitted within 210 days of the vacancy. *See id.*; S. Rep. No. 105-250 at 14. Finally, the FVRA enforces these requirements by providing that actions taken by certain officials who serve in violation of the statute "shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d). Together, these provisions "create an incentive for the President to submit a nomination," and they ensure that "constitutionally mandated procedures ... [are] satisfied before acting officials may serve in

positions that require Senate confirmation." S. Rep. No. 105-250 at 8, 14.

In particular, Section 3345 limits the pool of individuals who may serve as an acting official, thereby preventing the President from "nam[ing] temporary officers of his unfettered choice." *Id.* at 8. Section 3345(a)(1) sets forth the default rule: "[T]he first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(1). The President may override this default rule by "direct[ing]" either "a person who serves in [another PAS position]" within the Government, or a senior government employee (i.e., an employee who has worked for at least 90 days at a pay rate of GS-15 or higher) from the same agency, "to perform the functions and duties of the vacant office temporarily in an acting capacity." *Id.* § 3345(a)(2)-(3).[1]

Section 3345(b), the provision at issue here, imposes additional restrictions on acting officers whom the President has nominated for permanent appointment. Section 3345(b)(1) provides that "a person may not serve as an acting officer under this section" if the President nominates him for the vacant PAS office and, during the year preceding the vacancy, he either "did not serve in the position of first assistant" at all or "served in the position of first

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[1] In the context of certain Executive offices of a fixed term, the President also "may direct an officer who is nominated by the President for reappointment for an additional term to the same office ... without a break in service, to continue to serve in that office" while his nomination for reappointment is pending. 5 U.S.C. § 3345(c)(1).

assistant" for less than 90 days. *Id.* § 3345(b)(1). In other words, under Section 3345(b)(1), a nominee can serve as the acting official only if he is an experienced first assistant. *See id.* Section 3345(b)(2) creates a further exception to the restriction on acting service by a nominee. It allows first assistants with less than 90 days of experience to serve as both the acting official and the permanent nominee if the first assistant position is itself a PAS position and "the Senate has approved the appointment of such person to such office." *Id.* § 3345(b)(2).

B. Lafe Solomon Serves As Acting General Counsel Of The NLRB In Violation Of The FVRA

This case arises from Lafe Solomon's service as Acting General Counsel of the NLRB.

Under the National Labor Relations Act (NLRA), the General Counsel of the NLRB must be appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 153(d). He has "final authority ... in respect of the investigation of charges and issuance of complaints" alleging unfair labor practices. *Id.*

In June 2010, Ronald Meisburg resigned as NLRB General Counsel. The President directed Mr. Solomon to serve as the Board's Acting General Counsel pursuant to Section 3345(a) of the FVRA. *See* Pet. App. 5a.[2] At that time, Mr. Solomon was not

[2] The President did not invoke the NLRA's alternative method for appointing a temporary Acting General Counsel, "perhaps because the FVRA allows an acting officer to serve for a longer period of time." Pet. App. 6a (citing 29 U.S.C. § 153(d)); *see* 5 U.S.C. § 3347(a)(1)(A) (FVRA does not override statutory

the first assistant to the General Counsel, and his position did not require Presidential appointment or Senate confirmation. Mr. Solomon did, however, satisfy the salary and experience requirements of the FVRA's senior government employee provision, 5 U.S.C. § 3345(a)(3), because he had been serving as the Director of the NLRB's Office of Representation Appeals for ten years. *See* Pet. App. 11a.

Six months later, on January 5, 2011, the President nominated Mr. Solomon to serve as NLRB General Counsel on a permanent basis. *See* Pet. App. 6a. The Senate did not act on that nomination, and it was returned to the President. *See* Pet. App. 6a (citing 159 Cong. Rec. S17 (daily ed. Jan. 3, 2013)). The President resubmitted Mr. Solomon's nomination on May 24, 2013, but ultimately withdrew it and nominated Richard Griffin, who was confirmed by the Senate on October 29, 2013. *See* Pet. App. 6a. Mr. Solomon served as Acting General Counsel from June 21, 2010, to November 4, 2013.

C. Proceedings Below

In January 2013, while Mr. Solomon was serving as the NLRB General Counsel on an acting basis, an unfair labor practice complaint was issued against Respondent SW General, Inc. *See* Pet. App. 7a. The complaint alleged that Respondent violated the NLRA by unilaterally discontinuing annual bonus payments to certain long-term employees. *See* Pet.

(continued...)

provisions "expressly" authorizing the President to designate acting official); S. Rep. No. 105-250 at 1 (FVRA does not override appointment provision in NLRA).

App. 7a (citing 29 U.S.C. § 158(a)(1), (5)); Pet. App. 40a. Respondent argued that it fulfilled its obligations to make such payments under the collective bargaining agreement, and that it had no duty to make additional payments after that agreement expired. *See* Pet. App. 62a-63a. An administrative law judge (ALJ) disagreed. *See* Pet. App. 104a.

Respondent filed exceptions to the ALJ's decision. *See* Pet. App. 7a. In addition to contesting the ALJ's legal and factual findings, Respondent argued that the complaint was invalid because Acting General Counsel Solomon was serving in violation of the FVRA. *See* Pet. App. 7a. The NLRB adopted the ALJ's recommended order without addressing Respondent's FVRA challenge. *See* Pet. App. 7a; *see also* Pet. App. 31a-37a.

In an opinion by Judge Henderson (joined by Judges Srinivasan and Wilkins), the D.C. Circuit vacated the NLRB's order. *See* Pet. App. 1a-30a. The court agreed with Respondent that the complaint was unauthorized because Section 3345(b)(1) rendered Mr. Solomon "ineligible to serve as Acting General Counsel once the President nominated him to be General Counsel." Pet. App. 7a. Section 3345(b)(1), the court explained, "prohibits a person from being both the acting officer and the permanent nominee unless (1) he served as the first assistant to the office in question for at least 90 of the last 365 days or (2) he was confirmed by the Senate to be the first assistant." Pet. App. 11a (citing 5 U.S.C. § 3345(b)(1)-(2)).

The court held that the FVRA makes clear that Section 3345(b)(1)'s prohibition applies to "all acting officers," not just those who assume their position under Subsection (a)(1). *See* Pet. App. 11a, 20a. Subsection (b)(1) begins: "Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if [certain criteria are met]." 5 U.S.C. § 3345(b)(1). The term "a person," the court explained, is "broad" and "covers the full spectrum of possible candidates for acting officer." Pet. App. 12a. "And the phrase 'this section' plainly refers to section 3345 in its entirety"; it is not limited to subsection (a)(1). Pet. App. 12a. "Thus, the plain language of subsection (b)(1) manifests that no person can serve as both the acting officer and the permanent nominee (unless one of the exceptions in subsections (b)(1)(A) or (b)(2) applies)." Pet. App. 13a.

The court rejected the Government's contrary interpretation, which "focus[ed]" on the phrase, "[n]otwithstanding subsection (a)(1)." Pet. App. 13a. According to the Government, this phrase "limits subsection (b)(1)'s prohibition to first assistants who become acting officers pursuant to subsection (a)(1)." Pet. App. 13a. But the word "notwithstanding" means "in spite of," not "for purposes of" or "with respect to." Pet. App. 13a. The "'notwithstanding' clause" therefore does not restrict "the ultimate scope of subsection (b)(1)." Pet App. 14a.

In the face of the FVRA's "plain language," the court found the Government's reliance on inconsistent floor statements and other legislative history unpersuasive. Pet. App. 17a. The court also noted that the Government's reading might render other provisions of Section 3345 "superfluous." Pet.

App. 15a-16a. In particular, references to the first assistant in Sections 3345(b)(1)(A)(i) and 3345(b)(2)(A) would be unnecessary if Section 3345(b)(1) already referred only to first assistants. *See* Pet. App. 15a-16a; *infra* 17-19.

"Because Solomon was never a first assistant and the President nominated him to be General Counsel on January 5, 2011," the court held that he "served in violation of the FVRA from that date forward." Pet. App. 20a. The court next considered the consequences of Mr. Solomon's invalid service. Although actions taken in violation of the FVRA generally "shall have no force or effect" and "may not be ratified," the FVRA creates an exception for actions taken by five types of officials, including the General Counsel of the NLRB. 5 U.S.C. § 3348(d), (e)(1)-(5). Therefore, rather than being automatically void, Mr. Solomon's actions were subject to certain potential defenses by the Government. *See* Pet. App. 21a-22a. Here, however, neither of the Government's defenses salvaged Mr. Solomon's actions. Pet. App. 22a-29a. The court accordingly dismissed the complaint and vacated the NLRB's order. Pet. App. 30a.

The Government filed a petition for rehearing en banc, which was denied without comment by a vote of 7-3. Pet. App. 114a.

REASONS FOR DENYING THE PETITION

"Review on a writ of certiorari is not a matter of right," and this Court exercises its "judicial discretion" to grant the writ "only for compelling reasons." Sup. Ct. R. 10. The quintessential reason for granting review is to address "real or intolerable conflict[s]"

among federal or state appellate courts on "important" questions of federal law. Stephen M. Shapiro, et al., SUPREME COURT PRACTICE 241 (10th ed. 2013) (internal quotation marks omitted); *see* Sup. Ct. R. 10(a)-(c). In addition to implicating "recurring" "issues of national importance," such conflicts should be "well-developed." Shapiro, *supra*, 240, 246-47. Certiorari may also be warranted where a decision "holds a federal statute unconstitutional." *Id.* at 264. But absent a conflict or serious constitutional question, this Court does not typically grant review. *See id.* at 239-40. That is particularly true where there is little doubt that the decision below is correct. *See id.*

All of these traditional criteria counsel in favor of denying this petition. This case presents a straightforward issue of statutory interpretation on which there is no conflict of authority. To the contrary, every court that has considered the question presented agrees: Section 3345(b)(1) applies to all acting officials.

The Government's dissatisfaction with that universal understanding of the statute is not a basis for this Court's review. The D.C. Circuit properly applied traditional principles of statutory interpretation to give the FVRA its plain meaning. Lacking any compelling reason justifying this Court's intervention, the Government inflates the importance of the question presented, insisting that this Court's immediate review is necessary to provide certainty going forward. But the FVRA is clear (and despite that, by the Government's own account, a half-dozen acting officers are still serving in violation of the unanimous interpretation of all courts). The only

uncertainty is whether the Executive Branch will obey the law. It does not need this Court's assistance to do so.

I. EVERY COURT THAT HAS CONSIDERED THE QUESTION PRESENTED AGREES THAT SECTION 3345(b)(1)'S PROHIBITION APPLIES TO ALL ACTING OFFICIALS

The Government does not even attempt to argue that the decision below conflicts with a decision from any other court. *See* Sup. Ct. R. 10. In fact, every court to consider the question presented has concluded that Section 3345(b)(1)'s prohibition applies to all acting officials, not just first assistants.

The only other circuit that has addressed the issue "agree[s] with the D.C. Circuit as to § 3345(b)(1)'s reach." *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 558 (9th Cir. 2016) (Friedland, J.). *Kitsap*, like this case, involved the validity of actions that Mr. Solomon took while serving as the NLRB General Counsel on an acting basis. *See id.* at 554. The NLRB filed a petition for injunctive relief pursuant to Section 10(j) of the NLRA, 29 U.S.C. § 160(j). *Id.* The employer argued that the petition was invalid because Mr. Solomon, whose acting service violated the FVRA, could not authorize it. *See id.* (citing 29 U.S.C. §§ 153(d), 160(j)).

In a unanimous opinion, the Ninth Circuit agreed with the D.C. Circuit's "thorough[] analy[sis] [of] the statutory text and legislative history." *Id.* at 558. It held that "the text of the FVRA clearly and unambiguously operates to make (b)(1) applicable to all subsections of § 3345(a), not merely to (a)(1)." *Id.* at 562. The court rejected the Government's contrary

argument, which "conflicts with the plain text of the statute." *Id.* at 564. And it was not persuaded by the Government's reliance on "inconclusive" legislative history. *Id.* at 562.

District courts that have considered the question presented agree: "[W]hen Solomon was nominated to the General Counsel position, his temporary appointment became invalid pursuant to section 3345(b)(1)." *Hooks v. Remington Lodging & Hospitality, LLC*, 8 F. Supp. 3d 1178, 1187 (D. Alaska 2014); *see Hooks v. Kitsap Tenant Support Servs., Inc.*, No. C13-5470, 2013 WL 4094344, at *2 (W.D. Wash. Aug. 13, 2013).

The only "conflict" the Government identifies is with "the Executive Branch's longstanding interpretation" of the FVRA. Pet. 5. The Government properly does not suggest that conflicts with agency opinions, particularly opinions that are not entitled to deference, are the sort of conflicts this Court typically intervenes to resolve. *See* Sup. Ct. R. 10; Shapiro, *supra*, 241-43; *see also Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (OLC opinions not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). Nor does a party's—including the Government's—subjective disagreement with the decision below provide a basis for this Court's intervention. *See* Sup. Ct. R. 10.

If the question presented is as important as the Government argues, *but see infra* 27-28, it will recur, and the Court will have another opportunity to grant certiorari if a circuit split develops. Absent a conflict among the circuits, however, this Court's review is

premature and unwarranted. *See* Sup. Ct. R. 10; Shapiro, *supra*, 240, 246-47

II. THE DECISION BELOW IS CORRECT

The Government devotes most of its petition to the merits of the question presented. This Court does not typically grant certiorari merely to correct errors. *See* Sup. Ct. R. 10. In any event, the D.C. Circuit did not err. The text, structure, and purpose of the FVRA all point to the same conclusion: Section 3345(b)(1) applies to all acting officers, not just first assistants serving under Subsection (a)(1).

A. Section 3345(b)(1) Applies To All Acting Officials

As both the D.C. and Ninth Circuits unanimously concluded, the language of Section 3345(b)(1) is "clear." Pet. App. 18a; *see Kitsap*, 816 F.3d at 562. It "unambiguously operates to make (b)(1) applicable to all subsections of § 3445(a), not merely to (a)(1)." *Kitsap*, 816 F.3d at 562.

1. Subsection (b)(1) provides that, "[n]otwithstanding subsection (a)(1), *a person* may not serve as an acting officer for an office *under this section*" under specified circumstances. 5 U.S.C. § 3345(b)(1) (emphasis added).

Congress's use of the term "a person" confirms that it was referring to all acting officials. These words have broad and inclusive meaning. *See* Black's Law Dictionary 1142 (6th ed. 1990) (defining "person" to mean "a human being"); *id.* at 1477 (word "a" has a "generalizing force"); *see also Pfizer v. Gov't of India*, 434 U.S. 308, 312 (1978) ("the phrase 'any person'" has a "naturally broad and inclusive meaning"). They include "the full spectrum of possible

candidates for acting officer." Pet. App. 12a. Had Congress intended to refer only to first assistants, "it likely would have said 'first assistant' instead of 'a person.'" *Kitsap*, 816 F.3d at 559.

Moreover, Congress's use of the words "this section" indicates that it "intended to refer to § 3345 in its entirety." *Id.* As other provisions within Section 3345 confirm, Congress knew how to identify a particular subsection or paragraph when it wanted to do so. *See, e.g.*, 5 U.S.C. § 3345(a)(3)(B) ("subparagraph (A)"); *id.* § 3345(b)(2) ("Paragraph 1"); *id.* § 3345(b)(2)(A) ("subsection (a)"); *id.* § 3345(c)(1) ("subsection (a)(1)"). Congress's reference to "this section" rather than to Subsection (a)(1) must have meaning. *See, e.g.*, *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987).

2. The structure of Section 3345 bolsters this conclusion. "It is ... a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). As both the D.C. and Ninth Circuits recognized, construing Section 3345(b)(1) to apply to first assistants, PAS officers, and senior government employees alike avoids superfluity. *See* Pet. App. 15a; *Kitsap*, 816 F.3d at 560.

First, these courts' interpretation of Section 3345(b)(1) gives meaning to the exception in Section 3345(b)(2)(A) for a "person [who] is serving as the first assistant to the office of an officer described under subsection (a)." If Section 3345(b)(1)'s reference to "a person" includes *only* first assistants, there would be no need for an exception in Subsection

(b)(2)(A) for individuals serving as first assistants: "[T]he current first assistant—whether he became first assistant before or after the vacancy—is necessarily serving as a first assistant." Pet. App. 16a. Indeed, by equating "person" with "first assistant," the Government reads Subsection (b)(2)(A) to apply to "a first assistant" who "is serving as the first assistant." As the Government recognizes, therefore, its reading reduces Section 3345(b)(2)(A) to a mere "restate[ment]" of already-applicable criteria. Pet. 18.

Second, interpreting Section 3345(b)(1) to apply only to first assistants could render the condition in Subsection (b)(1)(A)(i)—that the person "'did not serve in the position of first assistant to the office'" in the prior 365 days—"inoperative" as well. Pet. App. 16a (quoting 5 U.S.C. § 3345(b)(1)(A)(i)). Although neither court needed to reach the question, both the D.C. and Ninth Circuits noted that "subsection (a)(1) may refer [only] to the person who is serving as first assistant *when the vacancy occurs*." Pet. App. 15a; *see Kitsap*, 816 F.3d at 560. If this interpretation is correct—a question on which the Government has flip-flopped[3]—then Subsection (b)(1)(A)(i) would be superfluous because the first assistant at the time of the vacancy "*necessarily* served as first assistant in

[3] OLC initially concluded that "the better understanding is that you must be the first assistant when the vacancy occurs in order to be the acting officer [under Section 3345(a)(1)]." Guidance on the Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 63-64 (1999). OLC later determined that its "initial understanding was erroneous" and reversed course. Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 179 (2001).

the previous year." Pet. App. 16a; *see Kitsap*, 816 F.3d at 560. By contrast, interpreting Section 3345(b)(1) to reach all acting officers avoids superfluity because "many PAS officers (subsection (a)(2)) and senior agency employees (subsection (a)(3)) will not have served as the first assistant in the prior year." Pet. App. 16a; *see Kitsap*, 816 F.3d at 560.

3. The D.C. Circuit's understanding that Section 3345(b)(1) applies to all acting officials is also consistent with the purposes of the FVRA.

Congress's primary goal was to reclaim its role under the Appointments Clause by preventing the President from directing his chosen replacement to perform PAS functions as an acting official without subjecting that individual to the Senate's scrutiny. *See supra* 4-6. Section 3345(b)(1) advances that purpose. By generally preventing a nominee from simultaneously serving as an acting official, that provision requires the President to obtain the Senate's advice and consent before advancing his agenda. Congress allowed the President to choose from a specified pool of competent caretakers—first assistants, PAS officers, and senior agency employees—to serve as acting officials. *See* 5 U.S.C. § 3345(a). Congress thus sought to allow an agency to continue functioning, with minimal change in direction, without having to wait for Senate approval. *See* S. Rep. No. 105-250 at 12. But when it comes to the permanent nominee, Congress wanted to preserve its constitutional role. *See id.* at 5. Congress did not want the President to set his chosen replacement to work without first nominating an official and obtaining Senate approval.

Section 3345(b)'s limited exception for nominees who are also experienced or Senate-confirmed first assistants is consistent with these objectives. *See* 5 U.S.C. § 3345(b)(1)(A), 3345(b)(2). By virtue of their longstanding or Senate-approved work as first assistants, these individuals are the acting officials *most* competent to keep the agency humming. And as nominees, they are the least likely to represent a change to the status quo. It accordingly makes sense that Congress chose to allow these individuals—and no others—to continue to serve in an acting role even when nominated to fill the permanent position.

B. The Government's Contrary Arguments Fail

The Government's attempts to overcome Section 3345(b)(1)'s unambiguous text are unavailing.

1. The Government's principal argument is that the phrase "[n]otwithstanding subsection (a)(1)" means that Section 3345(b)(1) creates "an exception *only* to Subsection (a)(1)." Pet. 14 (emphasis added). But courts interpret words according to "their ordinary, contemporary meaning." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014). The ordinary meaning of "notwithstanding" is "in spite of." Oxford English Dictionary (2d ed. 1989); Black's Law Dictionary (10th ed. 2014). Thus, "the use of ... a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993).

Here, the "notwithstanding" clause "simply means that (b)(1)'s limitations control, even to the extent

that (a)(1)'s automatic directive that first assistants 'shall' serve in an acting capacity may conflict with those limitations." *Kitsap*, 816 F.3d at 559. But that does not mean "that (b)(1) applies *only* to (a)(1)." *Id.* Had Congress intended that result, it would have said "for purposes of" or "with respect to" Subsection (a)(1)—terms with meanings different than "notwithstanding." Pet. App. 13a. Indeed, Congress's use of the phrase "[f]or purposes of" elsewhere in Section 3345 confirms that "it knew how to use limiting language when it wanted to." Pet. App. 15a (citing 5 U.S.C. § 3345(c)(2)).

The Government argues that, if Congress had intended to apply Section 3345(b)(1) to all acting officials, it would have "provided that the limitations apply '[n]otwithstanding subsections (a)(1), (a)(2), and (a)(3).'" Pet. 14. That argument ignores that Subsections (a)(2) and (a)(3), unlike Subsection (a)(1), do not create an automatic, default rule. *See* 5 U.S.C. § 3345(a)(1) (the first assistant "shall" take over as acting officer); *Kitsap*, 816 F.3d at 560. It is hardly surprising that Congress singled out Subsection (a)(1) for express override because it is the one provision that, by virtue of its mandatory language, most directly conflicts with Subsection (b)(1).

2. Responding to the D.C. Circuit's textual analysis, the Government claims that the words "this section" "clarif[y]" that Subsection (b)(1) "does not apply to non-FVRA designations made under other statutory provisions." Pet. 17 n.2. That is wrong because Section 3347(a) already makes clear that certain statutory provisions provide independent alternatives to the FVRA. 5 U.S.C. § 3347(a); *see* S. Rep. No. 105-250 at 15-17. There was no need for

additional clarification. And even if there were, Congress would not have clarified matters by referring to "this section" if it meant to include only officials acting pursuant to "Subsection (a)(1)."

The Government's argument that the term "a person" includes first assistants serving under Subsection (a)(1) fares no better. *See* Pet. 16. PAS officials are people, too. So are GS-15 employees. Congress's all-inclusive language encompasses all three types of acting officials.

3. The Government next accuses the D.C. Circuit of "repudiat[ing]" the Executive Branch's "longstanding interpretation" of the FVRA, reflected in guidance from the Office of Legal Counsel. Pet. 11, 14; *see* 23 Op. O.L.C. at 64. An "advisory opinion[] ... of the ... OLC," of course, "is not an administrative interpretation that is entitled to deference under *Chevron*." *Crandon*, 494 U.S. at 177 (Scalia, J., concurring).

Moreover, the "longstanding interpretation" on which the Government relies so heavily is a conclusory statement lacking any analysis of the FVRA. *See* 23 Op. O.L.C. at 64; *see also* Letter from Carlotta C. Joyner, Director, Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R, at 2-4 (Feb. 23, 2001), http://www.gao.gov/assets/80/75036.pdf (assuming without explanation that Section 3345(b)(1)'s prohibition applies only to first assistants). OLC subsequently repudiated one of the conclusions it reached in this

same "question and answer" memorandum, explaining that it "did not thoroughly consider" the issue and its "initial understanding was erroneous." 25 Op. O.L.C. at 179. OLC's unreasoned understanding of Section 3345(b)(1) is equally deficient.

4. The Government next turns to legislative history. However, "even the most formidable argument concerning the statute's purposes could not overcome" its unambiguous text. *Kloeckner v. Solis*, 133 S. Ct. 596, 607 n.4 (2012); *see supra* 16-19. And the Government's evidence of legislative intent is "anything but" formidable. Pet. App. 17a. The D.C. Circuit correctly refused to "allow[] ambiguous legislative history to muddy clear statutory language." *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011); *see* Pet. App. 17a.

As an initial matter, the Government relies on a version of the FVRA that Congress never enacted. It emphasizes that the predecessor to Section 3345(b)(1) contained in an earlier draft bill applied only to first assistants.[4] *See* Pet. 23. From that, the Government extrapolates that the same limitation carried through to the FVRA. *See* Pet. 23-24. The Government's logic fails because the language that Congress ultimately enacted "looks quite different"—suggesting, if

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[4] The unenacted language provided that a person whom the President has nominated for appointment "may not serve as an acting officer for an office under this section" if that person (1) "serves in the position of first assistant to such officer" on the date of the vacancy, and (2) has held that position for less than 180 of the past 365 days. S. Rep. No. 105-250 at 25.

anything, that Congress jettisoned the earlier limitation. Pet. App. 19a; *see Kitsap*, 816 F.3d at 563.

The legislative history discussing the enacted version of Section 3345(b)(1) is, at best, "inconclusive." *Kitsap*, 816 F.3d at 562. The Government is quick to quote Senator Thompson's statement supporting its view that Section 3345(b)(1) "'applies only when the acting officer is the first assistant.'" Pet. 25 (quoting 144 Cong. Rec. S12822 (daily ed. Oct. 21, 1998)). But that "is not the only statement on the subject." *Kitsap*, 816 F.3d at 562. Senator Byrd, an "original sponsor" of the FVRA, contradicted Senator Thompson. 144 Cong. Rec. S12824 (statement of Sen. Byrd); *see* Pet. App. 17a-18a; *Kitsap*, 816 F.3d at 562. "[H]ew[ing] much more closely to the statutory text," Senator Byrd "suggested that subsection (b)(1) applies to all categories of acting officers." Pet. App. 18a & n.6 (citing 144 Cong. Rec. S12824 (statement of Sen. Byrd)).

The Government argues that expanding Subsection (b)(1)'s restrictions beyond those included in the initial draft bill is inconsistent with other changes Congress made to "enhance the flexibility of the statute." Pet. 24. For example, Congress added GS-15 employees as a third category of individuals eligible to serve as acting officers and reduced the time-in-service requirement in Subsection (b)(1) to 90 from 180 days. *Compare* S. Rep. No. 105-250 at 25, *with* 5 U.S.C. § 3345. But it is entirely sensible for Congress to increase the President's flexibility in one respect while limiting it in another.

As noted, Congress's primary goal was to prevent the President from directing his chosen replacement to perform PAS functions as an acting official without Senate approval. *See supra* 6-8. Congress's willingness to allow within-agency GS-15 employees to serve as acting officials recognized the need for greater flexibility. Not all PAS positions, after all, have first assistants, and moving individuals from other PAS positions would simply create new vacancies. *See* 144 Cong. Rec. S12822 (statement of Sen. Thompson); 144 Cong. Rec. S11027 (statement of Sen. Levin). Expanding the pool of potential acting officials thus "permit[ted] the routine operation of the government to continue." 144 Cong. Rec. S6414 (statement of Sen. Thompson).

However, allowing a broader pool of people to act while also serving as nominees—potentially for years, *see* 5 U.S.C. § 3346(a)-(b)—would threaten to "obliterate[] the constitutional requirement that the officer serve only after the Senate confirms the nominee." S. Rep. No. 105-250 at 7; *see supra* 3-6. By generally preventing nominees from simultaneously serving as acting officials, Congress ensured that the President would obtain the Senate's approval before advancing his agenda. And it sought to preserve the status quo in the meantime, by allowing a limited pool of caretakers to keep the agency running.

5. Finally, the Government claims that interpreting Section 3345(b)(1) to apply to all acting officials under the FVRA is unnecessary to protect the Senate's advice-and-consent role. The Government recognizes that Section 3345(b)(1) is critical to preventing "the Executive Branch from

circumventing the advice-and-consent process" through the "use of eleventh-hour first-assistant appointments." Pet. 13. It nevertheless claims there are no similar concerns when the acting official selected by the President holds a different PAS position, or is a GS-15 employee, because Subsections (a)(2) and (a)(3) already protect the Senate's advice-and-consent role. Pet. 21.

The Government is wrong. There are more than 1,200 PAS positions across dozens of agencies. *See* H. Comm. on Oversight & Gov't Reform, 112th Cong., Policy and Supporting Positions app. 1, at 200 (Comm. Print 2012). These positions involve different skill sets, areas of expertise, and types of responsibility. Compare, for example, the Attorney General, Secretary of Defense, NASA Administrator, Federal Mine Safety and Health Review Commission members, and National Council on the Humanities members. Senate confirmation for one of these positions is hardly a proxy for the Senate's consent to the same individual's service in an entirely different PAS office.

Likewise, there are thousands of GS-15 employees, many of whom are hired from outside the Government each year. In 2005, for example, the Government filled more than 3,000 positions at the GS-15 level with external applicants. Merit Systems Protection Board, *In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees Outside the Federal Government*, at 9 (2008), *available at* http://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=323118&version=323564&application=ACROBAT. Service in a particular agency for at least 90 days during the year

preceding a vacancy may make an individual competent to keep things running when a vacancy arises. *See* 5 U.S.C. § 3345(a)(3). But it is no substitute for Senate approval before a chosen nominee begins to advance the President's agenda under the guise of acting service. That would "circumvent[] the advice-and-consent process" no less than when an eleventh-hour first assistant serves both roles. Pet. 13.

* * *

In sum, the D.C. Circuit's interpretation of the FVRA comports with the statute's text, structure, and purpose. The Government's arguments to the contrary do not merit this Court's review.

III. THE QUESTION PRESENTED IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S REVIEW

At bottom, the Government seeks certiorari based on its view of the importance of the question presented. It is therefore surprising that, out of the hundreds if not thousands of potential vacancies in PAS positions over the 18 years since the FVRA became law, the Government identifies only 14 acting officials whose conduct even arguably is affected by the decision below. *See* Pet. 5-6, 10. The Government vastly overstates the significance of the D.C. Circuit's holding.

The Government nevertheless worries that the decision below will create "uncertainty" when a new President takes office next year. Pet. 26, 30-31. There is no uncertainty: All courts agree that the FVRA is clear and unambiguous. *Supra* 14-15. The

new Administration simply needs to follow its mandates.

The Government further claims that interpreting Section 3345(b)(1) according to its plain meaning "significantly curbs the President's appointment authority." Pet. 26. Not so. The President remains free to *nominate* anyone he chooses for any PAS position. By contrast, he has never been free to "name temporary officers of his unfettered choice." S. Rep. No. 105-250 at 8. In any event, Section 3345(b)(1) does not meaningfully restrict the pool of potential acting officers. It imposes restrictions only on "acting officers who may *also be nominated* for permanent posts." *Kitsap*, 816 F.3d at 563; *see* Pet. App. 19a-20a. Moreover, approximately 40 other statutes provide independent, alternative avenues for installing acting officers. *See Kitsap*, 816 F.3d at 556; S. Rep. No. 105-250 at 17; *see also* 5 U.S.C. § 3347(a).

Finally, the Government inflates the impact of the decision below for an additional reason: The D.C. Circuit analyzed the consequences of FVRA violations only for actions of the General Counsel of the NLRB. It did not consider the effect of FVRA violations in other offices. It also had no reason to consider the meaning of Section 3348(d), which provides that actions taken in violation of the FVRA shall have "no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d); *see* Pet. App. 20a-21a. That provision does not apply to the NLRB General Counsel. *See* 5 U.S.C. § 3348(e)(1). Thus, the Government's concern that the decision below will necessarily undermine a host of decisions by other acting officials is unfounded.

CONCLUSION

The petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent acknowledges that the decision below reshapes the President's authority to fill the highest level posts in the Executive Branch on an acting basis, by repudiating the understanding of the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.*, on which every President since the statute's enactment has relied. And respondent does not dispute that the decision casts a cloud over the service of current and former officers in the highly consequential category of presidentially appointed, Senate-confirmed (PAS) offices, and calls into question the previously settled legal understanding shortly before a change in administrations that will necessitate many transitional and permanent appointments. Nor does respondent dispute that this case is an appropriate vehicle for reviewing the construction of the FVRA adopted below. Instead, respondent suggests that further review is unwarranted on the grounds that

it would be premature, that the decision below is unimportant, and that, in any event, the decision below is correct. Each of these arguments lacks merit. The petition for a writ of certiorari should be granted.

A. This Court's Review Is Warranted Now

Respondent argues that the court of appeals' interpretation of the FVRA, which alters the contours of the President's authority to designate acting officers, does not merit this Court's review because review would be "premature," Br. in Opp. 16, and because the decision below is not sufficiently important to warrant this Court's attention, *id.* 27-28. These arguments lack merit.

1. Respondent's contention that review would be premature is premised on its claim that "[i]f the question presented is as important as the Government argues * * * it will recur, and the Court will have another opportunity to grant certiorari if a circuit split develops." Br. in Opp. 15. The petition explained that this is not so—in an analysis that respondent does not address. Specifically, the petition explains, further developments concerning the question presented in the courts of appeals are unlikely because "the D.C. Circuit[has] exceptionally broad jurisdiction over administrative actions." Pet. 30. Consequently, future litigants seeking to bring a similar FVRA claim would have every reason to simply bring suit in the District of Columbia, where the decision below would control resolution of the question presented. See Pet. 29-30. Review in this case is not "premature" due to the absence of a circuit conflict, because future opportunities for a circuit conflict are unlikely to arise.

Respondent's proposal that this Court await the possibility of further litigation in other courts is particularly inappropriate because confusion and uncertainty appear likely to persist until the Court finally settles the meaning of the FVRA provision at issue here. As the petition describes, in the short time since its issuance, several examples of that confusion and uncertainty have arisen concerning the service of key officials and nominees. See Pet. 28-29 (discussing examples concerning nominee for Secretary of the Army; Under Secretary of Defense for Personnel and Readiness; Deputy Administrator of the Environmental Protection Agency; and Director of the Office of Personnel Management). The need to promptly resolve this uncertainty surrounding service at the highest levels is an additional consideration supporting this Court's review in this case.

Indeed, respondent's discussion of the uncertainty that the decision below has engendered is in substantial tension with its proposal that this Court await further litigation before finally resolving the meaning of the FVRA. Respondent does not dispute that the decision below has caused confusion and disruption, but brushes these problems aside on the ground that the President should eliminate the uncertainty that has been created surrounding high-level service—17 years after the FVRA was enacted—by reversing its longstanding interpretation, even before this Court has finally settled the FVRA's meaning. See Br. in Opp. 27-28 ("The new Administration simply needs to follow [the statute's] mandates."). That course, however, would definitively eliminate the potential for the further cases that respondent urges this Court to await. Respondent's contradictory arguments under-

score that the Court should settle the FVRA's meaning in this case—rather than awaiting further development that is unlikely to occur, at the cost of practical uncertainty that can impede government operations.

2. In the alternative, respondent asserts (Br. in Opp. 27-28) that although the decision below rejects the President's longstanding implementation of a statute affecting his appointment power—and casts doubt on high-level service under three Presidents—certiorari should be denied because the decision below is "not sufficiently important to warrant this Court's review." *Id.* at 27 (capitalization altered). Respondent's arguments on this point likewise lack merit.

Respondent first suggests (Br. in Opp. 27) that review of the question presented is unwarranted because too few officials are affected. Respondent relies on the petition's citation of 14 examples of past officials whose service would have been unlawful under the interpretation of the FVRA adopted below, in the course of describing how every President since the FVRA was enacted has filled high-level posts on an acting basis in accordance with the Office of Legal Counsel's interpretation of the statute. See Pet. 5-6. To the extent respondent is suggesting that the interpretation adopted by the decision below is relevant only to the service of 14 officials, however, respondent is mistaken. The government's preliminary review has identified scores of other officers who were nominated to occupy on a permanent basis PAS posts that they simultaneously held in an acting capacity, beyond the 14 illustrative examples in the petition. And because the affected posts are exclusively PAS positions, the officials whose service is called into question are

officials at the highest levels in the Executive Branch. Moreover, the decision below will also substantially constrain the authority of all future Presidents. Respondent errs in asserting that a decision that calls into question the actions of scores of high-level past officials and constrains future Presidents' authority over PAS posts is a decision too insignificant for this Court's review.

Respondent alternatively suggests (Br. in Opp. 28) that the decision below is not sufficiently important because it does not impose a significant constraint on presidential authority. But the President's role under the Constitution depends on the ability to effectively manage the Executive Branch. When the President has identified a senior official as the person most qualified to fill a high-level post, forcing the President to choose between nomination and acting service substantially limits the President's capacity to oversee the Executive Branch. See Pet. 26-27. Indeed, even respondent acknowledges this substantial impact once it turns to the merits of the FVRA question here. In that portion of its brief, respondent boldly asserts that the purpose of the FVRA is to prevent the President from "advancing his agenda" through acting officials, and that respondent's interpretation should be favored because it construes the FVRA provision here to stymie the President's ability to pursue his objectives during a vacancy. Br. in Opp. 19; see *id.* at 20, 25, 27. An interpretation of a federal statute that curbs presidential authority in this way is far from insignificant. This Court's review is warranted to

settle the scope of the FVRA's limits on presidential authority.[1]

B. The Court of Appeals' Decision Is Wrong

Respondent also argues (Br. in Opp. 16-27) that the court of appeals correctly construed the FVRA's limits, but its arguments are unavailing.

1. As the petition explains (Pet. 12-15), Section 3345(b)(1) is most naturally read as limiting only one of the three mechanisms for filling positions on an acting basis set out in the FVRA—the method for first-assistant service in Subsection (a)(1). That is because after Section 3345(a) sets out three separate mechanisms for acting service, Section 3345(b)(1) sets out a limitation that it describes as overriding only one of these three mechanisms. In particular, Subsection (b)(1) sets out a first-assistant-centric limitation on acting service that it specifies applies only "[n]otwithstanding subsection (a)(1)"—the first-assistant designation mechanism—rather than "not-

[1] Respondent also briefly suggests (Br. in Opp. 28) that the government "inflates the impact of the decision below" in emphasizing that the decision's impact "is heightened because of the stringent consequences that the FVRA imposes" for violations pursuant to 5 U.S.C. 3348(d), Pet. 27. Respondent suggests that the consequences of violations are unclear because the D.C. Circuit "did not consider the effect of FVRA violations" under Section 3348(d). Br. in Opp. 28. Section 3348 makes the consequences of violations plain, however, by specifying that subject to only a few exceptions, when an improperly-serving acting officer undertakes functions or duties tied exclusively to the PAS post in question, those actions "have no force and effect" and "may not be ratified." 5 U.S.C. 3348(d). And in any event, a decision that rejects the longstanding Executive Branch approach to acting designations would be significant enough to warrant review regardless of how attendant statutory penalties were construed.

withstanding" the designation mechanisms set forth in Subsections (a)(1), (a)(2), and (a)(3). 5 U.S.C. 3345(b)(1). And as explained in the petition (Pet. 5, 23-25), the interpretation of Subsection (b)(1) as overriding only the automatic accession of first assistants under Subsection (a)(1) is confirmed by the legislative history of the FVRA and by the construction given it by the General Accounting Office—an instrumentality of Congress—in 2001.

None of respondent's explanations justifies reading a provision made applicable "[n]otwithstanding subsection (a)(1)" as though it were made applicable "notwithstanding subsections (a)(1), (a)(2), and (a)(3)." Respondent first seeks support for its reading in the argument that "[t]he ordinary meaning of 'notwithstanding' is 'in spite of.'" Br. in Opp. 20. But that definition provides respondent no help, because construing Subsection (b)(1) as setting forth a rule that controls "in spite of" *Subsection (a)(1)* does not support construing Subsection (b)(1) as setting forth a rule that controls "in spite of" the entirely different directives concerning acting service in Subsections (a)(2) and (a)(3).[2]

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[2] Respondent invokes *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10 (1993) as supporting its interpretation of the "notwithstanding" clause here (Br. in Opp. 20), but *Cisneros* involved the distinct language that one would expect in a provision designed to have broad scope. The "notwithstanding" clause in *Cisneros* specified that a particular rule was to apply "[n]otwithstanding *any other provisions of this Contract*," rather than (as here) notwithstanding only a single provision. 508 U.S. at 14 (citation omitted) (emphasis added). It was this type of expansive "notwithstanding" clause that this Court said should be construed broadly. *Id.* at 18 ("[T]he use of *such* a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section

Nor is Congress's choice to single out only one of the three designation mechanisms plausibly explained on the ground that Subsection (a)(1), "by virtue of its mandatory language, most directly conflicts with Subsection (b)(1)." Br. in Opp. 21. As the petition explains (Pet. 15-16), in a discussion that respondent nowhere addresses, while Subsections (a)(2) and (a)(3) do not use the word "shall" because they apply only when the President chooses to invoke them, they are just as mandatory when invoked by the President as Subsection (a)(1) is when the President does not invoke them. They therefore just as "directly conflict[] with Subsection (b)(1)." Br. in Opp. 21.

2. In analyzing the text of the statute, respondent principally contends (Br. in Opp. 16-17) that Subsection (b)(1) should be read to override all of the FVRA's designation mechanisms because Subsection (b)(1) speaks of "person[s]" serving "under this section." 5 U.S.C. 3345(b)(1).

But that language does not defeat the natural conclusion to be drawn from Subsection (b)(1)'s limited "notwithstanding" language because it is consistent with either party's reading of Section 3345. While acting officials under Subsections (a)(2) and (a)(3) are "persons" serving under the FVRA, so too are acting officials under Subsection (a)(1). Congress could have used "person" and "this section" in Subsections (b)(1) and (b)(2) when discussing service by either the broader or narrower class. Indeed, as the petition notes (Pet. 17 n.3), the earlier version of the bill on

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override conflicting provisions of any other section.") (emphasis added); cf. Br. in Opp. 20 (quoting this language but replacing the word "such" with ellipses).

which the FVRA was based used the terms "person" and "this section," even though the only officials covered under that earlier version were indisputably first assistants serving under the subsection providing for automatic accession of the first assistant—*i.e.*, Subsection (a)(1) of the FVRA. The "person" and "this section" language accordingly does not counsel against the conclusion that Subsection (b)(1) is best read to defeat the operation of only the mechanism in Subsection (a)(1) that it singles out and expressly overrides.

Respondent next suggests that its reading is preferable because it accords with the "cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." Br. in Opp. 17 (citation and internal quotation marks omitted). Respondent's interpretation does not afford that benefit, however, because it gives no meaning to the phrase "[n]otwithstanding subsection (a)(1)." Respondent treats the phrase "notwithstanding subsection (a)(1)" as having no effect on which subsections *are* overridden by Subsection (b)(1) or on which are *not* overridden, because respondent considers every statutory designation mechanism to be overridden by Subsection (b)(1), whether expressly mentioned or not. Since respondent's view thus gives the "[n]otwithstanding subsection (a)(1)" proviso no legal effect, respondent's interpretation cannot be defended on the grounds that it avoids superfluity.

3. Respondent fares no better in seeking to explain the effects of its interpretation. As the petition explains, the manner in which every President has invoked the FVRA serves the statute's objectives while avoiding disparities in treatment of acting officials that do not serve the statute's objective of preventing

the use of acting designations to circumvent the advice-and-consent process. Pet. 18-19. Respondent seeks to justify the strange consequences of its interpretation by positing an alternative FVRA purpose of impeding the President ability's to "advanc[e] his agenda"—by preventing the President from having his "chosen replacement" serve as an acting official in advance of confirmation, even when that chosen replacement is within the "specified pool of competent caretakers" authorized to serve as acting officials under the FVRA. Br. in Opp. 19; see *id.* at 19-20.

But this hypothesized purpose is not a viable explanation of the disparities in treatment of acting officials that respondent's reading would produce. The FVRA indisputably authorizes the President to designate as both acting official and nominee an individual with 90 days of service in the position of first assistant prior to when the vacancy arose. See 5 U.S.C. 3345(b)(1)(A). Political appointees in first-assistant posts are more likely to have close connections to Presidents and their agendas than the senior career agency officials whose acting service is authorized under Subsection (a)(3). These provisions refute the suggestion that the FVRA reflects a "primary goal" of "prevent[ing] the President from directing his chosen replacement to perform PAS functions as an acting official without Senate approval." Br. in Opp. 25. On the contrary, as the petition explains (Pet. 18-22), respondent's view simply introduces strange disparities in the treatment of the acting officials that the statute allows to serve.[3]

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[3] Moreover, even under respondent's view, the FVRA would not prevent Presidents from picking acting officers who the President concludes will implement the administration's agenda from the

4. Finally, respondent offers no persuasive reason why the President's unbroken designation practice since the FVRA's enactment should not be given considerable weight in resolving the statute's meaning. See Pet. 22-23. Respondent does not dispute that every President since the FVRA's enactment has made appointments based on the understanding that Subsection (b)(1) limits only service by first assistants. Nor does it dispute that the Senate has routinely confirmed acting officials who were serving in a manner that would have violated the FVRA under respondent's reading. Indeed, like the government, respondent appears to have identified no occasion prior to the decision below on which Congress objected to such acting service. This settled practice sheds substantial light on the limitations that the FVRA was understood to impose when it was enacted. Respondent responds only that the Office of Legal Counsel opinion setting forth the Executive Branch's longstanding interpretation of the statute contained little detail, and that following the issuance of that opinion, the Office of Legal Counsel modified its view on a separate FVRA issue that was also addressed in that opinion. Br. in Opp. 23-24. But neither of those points undercuts the relevance of uniform practice to the

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FVRA-approved classes. Respondent's approach would simply force such officers to step down from acting service if the President finds no preferable outside candidate to fill the posts permanently and nominates them to serve permanently—in which case the President could pick new acting officials who the President concludes would also implement the administration's agenda. This presidential discretion belies the notion that the FVRA was intended to prevent the President from selecting acting officers who would implement the President's policy goals, when the President was choosing from among the class of approved acting officers.

meaning that the FVRA was understood to have when it was enacted. At a minimum, this Court should grant review to determine whether the approach adopted by every President since the statute's enactment should be set aside.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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QUESTION PRESENTED

Many important government posts must be filled by persons who are nominated by the President and confirmed by the Senate. The Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.*, provides that when such an office is vacant, its functions and duties may be performed temporarily in an acting capacity by either the first assistant to the vacant post, under Section 3345(a)(1); a person occupying another office in the Executive Branch that is required to be filled through the process of presidential appointment and Senate confirmation, who is designated by the President under Section 3345(a)(2); or a senior official in the same agency designated by the President under Section 3345(a)(3).

Section 3345(b) of the FVRA provides as a general rule that "[n]othwithstanding subsection (a)(1)," a person who is nominated to fill a vacant office that is subject to the FVRA may not perform the office's functions and duties in an acting capacity unless the person served as first assistant to the vacant office for at least 90 days in the year preceding the vacancy. 5 U.S.C. 3345(b)(1).

The question presented is whether the precondition in 5 U.S.C. 3345(b)(1) on service in an acting capacity by a person nominated by the President to fill the office on a permanent basis applies only to first assistants who take office under Subsection (a)(1) of 5 U.S.C. 3345, or whether it also limits acting service by officials who assume acting responsibilities under Subsections (a)(2) and (a)(3).

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Steven J. Duffield & James C. Ho:

The Illegal Appointment of Bill Lann Lee, Note, 2 Tex. Rev. L. & Pol. 335 (1998) 8

The (Still) Illegal Appointment of Bill Lann Lee, Comment, 3 Tex. Rev. L. & Pol. 403 (1999) 7

Larry M. Eig, Cong. Research Serv., *Statutory Interpretation: General Principles and Recent Trends* (2011), https://www.fas.org/sgp/crc/misc/97-589.pdf 27

Gen. Accountability Office:

Homeland Security: DHS's Actions to Recruit and Retain Staff and Comply with the Vacancies Act, http://www.gao.gov/assets/270/264033.pdf (July 2007) 51

Miscellaneous—Continued: Page

Violation of the 210-Day Limit Imposed by the Federal Vacancies Reform Act of 1998 (July 12, 2006), http://www.gao.gov/assets/80/75113.pdf 51

Violation of the 210-Day Limit Imposed by the Vacancies Reform Act (Mar. 18, 2002), http://www.gao.gov/assets/80/75124.pdf 50

Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60 (1999) 14, 50

Donald Hirsch, *Drafting Federal Law* (2d ed. 1989) 31

Spencer S. Hsu & Christopher Lee, *Paulison Is Skilled at Disasters*, Washington Post, Sept. 13, 2005 40

David L. Jordan, Note, *Separation of Powers: The Appointment of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights*, 26 Hastings Const. L.Q. 935 (1999) 8

Letter from Carlotta C. Joyner, Dir., Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R, (Feb. 23, 2001), http://www.gao.gov/assets/80/75036.pdf 14, 50

Letter from Victor S. Rezendes, Managing Dir., Strategic Issues, *Changed Interpretation of Requirements Related to First Assistants Under the Federal Vacancies Reform Act of 1998*, GAO-02-272R (Dec. 7, 2001), http://www.gao.gov/assets/80/75053.pdf 36

Miscellaneous—Continued: Page

Memorandum from Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* (Jan. 14, 1998) 6, 7, 8, 51

Office of Mgmt. & Budget, *Statement of Administrative Policy, S. 2176- Federal Vacancies Reform Act of 1998* (Sept. 24, 1998), http://clinton4.nara.gov/OMB/legislative/sap/1998/S2176-s.html 11

Oversight of the Implementation of the Vacancies Act: Hearing Before the Senate Comm. on Governmental Affairs, 105th Cong., 2d Sess. (1998) 6, 7, 8, 9, 51

Press Release, Office of the Press Secretary, The White House:

Bill Lann Lee Named Acting Assistant AG for Civil Rights (Dec. 15, 1997), 1997 WL 770918 7

President Obama Announces More Key Administration Posts (Sept. 20, 2012), https://www.whitehouse.gov/the-press-office/2012/09/20/president-obama-announces-more-key-administration-posts 54

Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services, 111th Cong., 1st Sess. (2009) 53

Nominations of David W. Ogden, of Virginia; and Robert Raben, of Florida, Each to be Assistant Attorney General for Department of Justice: Hearing Before the Senate Comm. on the Judiciary, 106th Cong., 1st Sess. (1999) 52

Nominations of the 108th Congress: Hearing Before the Senate Comm. on Environment and Public Works, 108th Cong., 2d Sess. (2004) 53

Miscellaneous—Continued: Page

Nominations to the Department of Transportation, the National Aeronautics and Space Administration, and the Department of Commerce: Hearing Before the Senate Comm. on Commerce, Science, and Transportation, 110th Cong., 1st Sess. (2007) 53

Nominations to the U.S. Depatment of Commerce and the Federal Trade Commission: Hearing Before the Senate Comm. on Commerce, Science and Transportation, 112th Cong., 1st Sess. (2011) 53

Morton Rosenberg, Cong. Research Serv., *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* (1998), https://www.fas.org/sgp/crs/misc/97-589.pdf 6, 7

S. 1761, 105th Cong., 2d Sess. (1998) 9

S. 1764, 105th Cong., 2d Sess. (1998) 9

S. Rep. No. 250, 105th Cong., 2d Sess. (1998) ..... *passim*

Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 28, 32

2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* (7th ed. 2014) 29, 32

Richard W. Stevenson, *After Days of Criticism, Emergency Director Resigns*, N.Y. Times, Sept. 13, 2005 40

In the Supreme Court of the United States

No. 15-1251

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 796 F.3d 67. The decision and order of the National Labor Relations Board (Pet. App. 31a-74a) is reported at 360 N.L.R.B. No. 109. The decision of the administrative law judge (Pet. App. 75a-111a) is available at 2013 WL 4041158.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2015. A petition for rehearing was denied on January 20, 2016 (Pet. App. 112a-115a). The petition for a writ of certiorari was filed on April 6, 2016, and was granted on June 20, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App. B, *infra*, 82a-92a.

STATEMENT

The court of appeals rejected a straightforward reading of the text of the Federal Vacancies Reform Act of 1998 (FVRA or Act), 5 U.S.C. 3345 *et seq.*, that Presidents of both parties had adopted and applied, without objection by Congress, since passage of the Act. The result of the court of appeals' decision is an upending of the settled understanding of when the President may nominate an official serving in an acting capacity to serve in the same position in a permanent capacity—an understanding reflected in more than 100 presidential nominations and in regular Senate confirmations in the nearly two decades since the Act was passed.

A. Statutory Background

Many of the highest-level offices in the Executive Branch are positions that may be filled only by the President, by and with the advice and consent of the Senate. These positions are often referred to as presidentially appointed, Senate-confirmed, or "PAS" offices.

The FVRA permits three classes of government officials to perform the duties of vacant PAS offices on a temporary basis. The limitations on who may temporarily perform the duties of a vacant PAS office are set out at 5 U.S.C. 3345. The first paragraph of that provision—Subsection (a)(1)—prescribes the general rule: When a PAS office becomes vacant, the "first assistant" to that office "shall perform" the office's functions and duties in an acting capacity. 5 U.S.C.

3345(a)(1). The FVRA then establishes exceptions to that rule of automatic accession by the first assistant.

The next two paragraphs of Subsection (a) set out alternative methods that the President may invoke to designate an acting officer, and thus set out the first two exceptions to the general rule. Paragraph (2) provides that "notwithstanding paragraph (1)," the President may direct a person who already serves in another PAS position to perform the functions and duties of a vacant office. 5 U.S.C. 3345(a)(2). Paragraph (3) provides that "notwithstanding paragraph (1)," the President may direct a person to perform the duties of a vacant office if the person has served in a senior position (defined as a position with a rate of pay equal to the minimum for a GS-15 or higher) in the agency at issue for at least 90 days in the year preceding the vacancy. 5 U.S.C. 3345(a)(3).

Subsection (b)(1)—the provision at issue in this case—sets out a third exception to the rule in Subsection (a)(1) that the first assistant "shall perform" the functions and duties of the vacant office. Using language that parallels the exceptions in Subsections (a)(2) and (a)(3), it states that "[n]otwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section" if the President nominates him for the vacant PAS office and, during the year preceding the vacancy, he "did not serve in the position of first assistant" or "served in the position of first assistant" for less than 90 days. 5 U.S.C. 3345(b)(1). Subsection (b)(2) then provides that this exception does not apply if "such person is serving as the first assistant to the office of an officer described under subsection (a)," and that first-assistant position is it-

self a PAS office to which the acting officer had been confirmed. 5 U.S.C. 3345(b)(2).

This case concerns whether the first-assistant-focused limitations that Subsection (b)(1) imposes "[n]otwithstanding subsection (a)(1)" apply only to first assistants who automatically assume the functions and duties of the vacant office under Subsection (a)(1), as the Executive Branch has openly maintained, without objection by Congress, since the time of the FVRA's enactment, or whether those limitations also apply to PAS officials and senior agency personnel who are instead directed by the President to perform those functions and duties pursuant to Subsections (a)(2) and (a)(3), as the court of appeals concluded.

1. Appointments practice before enactment of the Federal Vacancies Reform Act of 1998

Since the earliest days of our Nation, Congress has afforded the President substantial latitude to designate government officials to perform the duties of PAS offices on a temporary basis in the event of the sickness, death, incapacity, or resignation of the officeholder. See, *e.g.*, Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281 (authorizing President to select "any person," at his discretion, to serve temporarily as Secretary of State, Secretary of the Treasury, or Secretary of War—or as an officer in any of the corresponding departments—in the event of "death, absence from the seat of government, or sickness" of the principal officer); see also Act of Feb. 13, 1795, ch. 21, 1 Stat. 415 ("any person"); Act of Feb. 20, 1863, ch. 45, 12 Stat. 656 (authorizing acting service by any "head of any other Executive Department, or other officer in either of said Departments, whose appointment is vested in the President").

Those early statutes were replaced by the Act of July 23, 1868 (Vacancies Act of 1868 or Vacancies Act), ch. 227, 15 Stat. 168, which governed acting designations for PAS offices until the enactment of the FVRA in 1998. The Vacancies Act of 1868 gave the President substantial discretion to choose a person, from categories of individuals deemed qualified by Congress, to perform the duties of a vacant PAS position on an acting basis. It provided as a default rule that "the first or sole assistant" to the chief of any executive department (or the "deputy" to a bureau chief of any officer of a bureau) "shall * * * perform the duties" of the vacant office. *Id.* §§ 1, 2, 15 Stat. 168. In the alternative, it permitted the President to "authorize and direct the head of any other executive department or other officer" holding a PAS position within an Executive department "to perform the duties of the office vacant as aforesaid until a successor be appointed, or the sickness or absence of the incumbent shall cease." *Id.* § 3, 15 Stat. 168; see 5 U.S.C. 3345-3347 (1994).

The Vacancies Act imposed time limits on acting designations to ensure that Presidents did not use those designations to circumvent the Senate's advice-and-consent role. When first enacted, the Vacancies Act authorized acting service for only ten days. 15 Stat. 168. But successive statutes expanded the duration of permissible acting service as the processes of nomination and confirmation became more time-consuming, ultimately bringing the period of permissible acting service to 120 days. See Presidential Transitions Effectiveness Act, Pub. L. No. 100-398, § 7(b), 102 Stat. 988; 5 U.S.C. 3348 (1994).

2. Perceived abuses spur congressional protest

The FVRA was proposed as a response to perceived circumventions of the limitations in the Vacancies Act. In 1973, the Executive Branch made a designation of an acting Director of the Federal Bureau of Investigation that would not have been authorized under the Vacancies Act framework, relying on the legal authority of the enabling act for the Department of Justice (DOJ), Act of June 22, 1870, ch. 150, 16 Stat. 162. See Morton Rosenberg, Cong. Research Serv., *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* 2-3 (1998) (*CRS New Vacancies Act Report)*; Memorandum from Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* 4-5 (Jan. 14, 1998) (*CRS Validity Memo)* (exhibit to *Oversight of the Implementation of the Vacancies Act: Hearing Before the Senate Comm. on Governmental Affairs*, 105th Cong., 2d Sess. 62-100 (1998)) (*Vacancies Act Hearing*). That designation drew swift protest from the Comptroller General, who leads the investigative arm of Congress now known as the Government Accountability Office (GAO). *CRS Validity Memo* 5; *CRS New Vacancies Act Report* 3.

Nevertheless, in subsequent years, over consistent congressional objection, Presidents from both parties invoked similar general authorities in order to designate officials to perform the duties of PAS positions without complying with the Vacancies Act. See *CRS New Vacancies Act Report* 1-4. By the 1990s, in the view of the Congressional Research Service, every department in the Executive Branch had a PAS position the duties of which were being performed by an offi-

cial whose service did not conform to the requirements of the Vacancies Act. *Id.* at 4. Some designees had not occupied positions that would qualify them for acting service under the Vacancies Act. See, *e.g.*, 144 Cong. Rec. 22,508-22,509 (1998) (offering examples). And many designees served for substantially longer than the Vacancies Act authorized. *CRS New Vacancies Act Report* 3-4. Members of Congress protested that those appointments undermined the Senate's constitutional role in the appointment of high-level government officers. See, *e.g.*, *Vacancies Act Hearing* 1-6, 8, 18, 22.

The protests reached a flash-point in 1998, soon after the Senate declined to confirm a particular nominee for the PAS office of Assistant Attorney General for the Civil Rights Division of the DOJ. The Executive Branch responded by bringing the candidate—Bill Lann Lee—from outside the government into the Civil Rights Division as "first assistant" to the vacant Assistant Attorney General position; Lee was then designated to perform the duties of the Assistant Attorney General on an acting basis. *CRS Validity Memo* 2; see Press Release, Office of the Press Secretary, The White House, *Bill Lann Lee Named Acting Assistant AG for Civil Rights* (Dec. 15, 1997), 1997 WL 770918, at *4. The President twice re-nominated Lee to fill the role in a permanent capacity, leaving him in place performing the duties of the office when the Senate declined to confirm him. *CRS Validity Memo* 2.

Several Senators wrote to the Attorney General to question Lee's designation. See Steven J. Duffield & James C. Ho, *The (Still) Illegal Appointment of Bill Lann Lee*, Comment, 3 Tex. Rev. L. & Pol. 403, 405 (1999) (citing letters from Sens. Hatch and Byrd);

Letter from Sen. Thurmond to Attorney General Reno (Jan. 23, 1998) (exhibit to *Vacancies Act Hearing* 125-127). The Congressional Research Service concluded that the designation was unlawful, reasoning that "the allowable 120 [day] period to serve as an acting under the Vacancies Act was exhausted" by Bill Lann Lee's predecessor as an acting official—and that the Vacancies Act clock did not restart with the designation of a new acting official. *CRS Validity Memo* 33.

Others contended that Lee was also ineligible for Vacancies Act service because he had been appointed first assistant to the Assistant Attorney General only *after* that PAS position became vacant. Steven J. Duffield & James C. Ho, *The Illegal Appointment of Bill Lann Lee*, Note, 2 Tex. Rev. L. & Pol. 335, 348-353 (1998) (arguing that the first-assistant provision allows acting service only by an individual who was "first assistant" to the particular PAS officeholder who died, resigned, or became sick or absent); David L. Jordan, Note, *Separation of Powers: The Appointment of Bill Lann Lee as Acting Assistant Attorney General For Civil Rights*, 26 Hastings Const. L.Q. 935, 938 (1999) (same).

The Department of Justice, for its part, maintained that the designation was valid without regard to the limitations of the Vacancies Act, on the basis of other departmental statutory authorities. See, *e.g.*, *CRS Validity Memo* 33; *Vacancies Act Hearing* 128 (letter from Assistant Attorney General Andrew Fois).

3. The FVRA is proposed to curb perceived circumvention of the Vacancies Act

The FVRA began as an effort to curb what some Members of Congress saw as "disregard of the Vacancies Act." 144 Cong. Rec. at 22,509 (statement of Sen.

Thompson, FVRA's lead sponsor); see, *e.g.*, S. Rep. No. 250, 105th Cong., 2d Sess. 13 (1998) (*Senate Report*); *Vacancies Act Hearing* 1-52.[1]

The bill reported by the Senate Committee maintained the basic framework of the Vacancies Act, but constrained practices that Members of Congress regarded as end-runs around its limitations. The bill retained the general rule that if a PAS officer resigned, died, or became unable to perform the duties of the office, the first assistant shall perform the duties of the PAS office. *Senate Report* 25 (proposed 5 U.S.C. 3345(a)(1)). But it curtailed efforts to "game[]" the Vacancies Act by using last-minute first-assistant designations to make individuals eligible for acting service. 144 Cong. Rec. at 12,432 (statement of Sen. Thompson, on behalf of all bill sponsors). In particular, the bill barred service in an acting capacity by a person who had been nominated to fill a vacant office on a permanent basis, if the nominee had "served in the position of first assistant to" the PAS officer who had resigned, died, or become unable to perform the duties of the office, but had only done so for fewer than 180 days in the 365-day period before the vacancy arose. *Senate Report* 25 (proposed 5 U.S.C. 3345(b)).

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[1] Members of Congress introduced alternative bills that also sought to ensure that acting designations were made under the terms of the Vacancies Act. S. 1761, 105th Cong., 2d Sess. 1-4 (1998) (sponsored by Sen. Byrd) (seeking to ensure compliance by stripping officials of pay for service not authorized under Vacancies Act); S. 1764, 105th Cong., 2d Sess. 4 (1998) (sponsored by Sen. Thurmond) (seeking to ensure compliance with the Vacancies Act by "further clarify[ing] the intention of Congress to reject" agencies' reliance on more general sources of authority as an independent basis for acting designations and by denying pay to officers who served in violation of the Vacancies Act).

This 180-day time-in-service requirement was intended to be long enough "to prevent manipulation of first assistants to include persons highly unlikely to be career officials." *Id.* at 13. This provision addressed the situation, exemplified by the designation of Bill Lann Lee, in which a person is made first assistant to a PAS position, immediately assumes the duties of that position, and continues to serve after being nominated by the President. See pp. 7-8, *supra*.

The bill left unchanged the President's longstanding authority to direct virtually any PAS official to perform the duties of a vacant PAS office. *Senate Report* 25 (proposed 5 U.S.C. 3345(a)(2)).

To prevent the Executive Branch from making appointments outside of the FVRA, the statute—both as first proposed and as ultimately enacted—specifies that it provides the exclusive means for temporarily filling a vacancy in a PAS office (other than a recess appointment), unless another statute "expressly" authorizes acting designations through a different mechanism. *Senate Report* 26; see 5 U.S.C. 3347(a)(1). The FVRA specifies that a statutory provision "providing general authority to the head of an Executive agency * * * to delegate duties," such as those on which the Executive Branch had been relying, was "*not* a statutory provision" permitting acting designations outside of the FVRA. *Senate Report* 26 (emphasis added); see 5 U.S.C. 3347(b).

4. The White House and Members of Congress insist on changes to give the President more flexibility

As reported by the Senate Committee, the proposed legislation drew objection from the White House and a number of Senators, who maintained that the bill would undermine oversight of the Executive Branch

by providing the President with inadequate flexibility in choosing acting officials. See Office of Mgmt. & Budget, *Statement of Administrative Policy, S. 2176—Federal Vacancies Reform Act of 1998* (Sept. 24, 1998), http://clinton4.nara.gov/OMB/legislative/sap/1998/S2176-s.html (*OMB Statement*); *Senate Report* 31 (additional views of Sens. Glenn, Levin, Lieberman, Cleland and Torricelli); *Senate Report* 35 (minority views of Sens. Durbin and Akaka). A number of Senators asserted that the bill was deficient because it did not give the President the ability to designate to perform the duties of a vacant office on an acting basis "long-time senior civil servant[s] within the agency," who "may be the best qualified to serve as acting officials," 144 Cong. Rec. at 22,514 (floor statement of Sen. Levin); see *Senate Report* 31 (additional views); *Senate Report* 34 (minority views).[2]

Finally, and of special relevance here, some Senators argued that "the length of service requirement for first assistants who are nominated"—*i.e.*, the re-

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[2] Nor were those the only objections. For example, to account for "the vagaries of the vetting and nomination process," *Senate Report* 13 (proposed 5 U.S.C. 3346), the initial bill extended the period of permissible service for acting officers from the 120 days authorized under the Vacancies Act to 150 days from the date of the vacancy, unless the President nominated someone to fill the position on a permanent basis, *id.* at 25-26. The White House and several Senators maintained that the proposed bill still did not allow for acting service of adequate duration. *OMB Statement* 1; *Senate Report* 34 (minority views). The FVRA as enacted further extended the period for which an official could perform the duties of a vacant PAS office to 210 days, in most cases, with additional tolling of time limits possible when a nomination was pending, and following a presidential transition. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 151, 112 Stat. 2681 (5 U.S.C. 3346, 3349a).

quirement in the reported bill that a first assistant have served as first assistant for 180 days before the vacancy arose in order to serve in an acting capacity after being nominated for a permanent appointment—should be shortened, to "ensure the smooth flow of government activity." *Senate Report* 31 (additional views).

A number of Senators stated that they would not support the FVRA unless the bill was changed to give the President greater flexibility. 144 Cong. Rec. at 22,512-22,513 (Sen. Levin); *id.* at 22,512-22,518 (Sen. Durbin); *id.* at 22,519 (Sen. Glenn); *id.* at 22,524-22,525 (Sen. Lieberman). Without those Senators' support, the bill's proponents were unable to succeed on a cloture vote on the Senate's consideration of the bill. *Id.* at 22,526.

The bill's sponsors then revised the FVRA proposal by making concessions to those who had sought greater flexibility for the President. The revised proposal was added to broader legislation, and enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (Omnibus Act), Pub. L. No. 105-277, 112 Stat. 2681. Responding to those who had urged that the pool of permissible acting officers be expanded to include senior agency officials, see 144 Cong. Rec. at 22,514 (statement of Sen. Levin); see also *Senate Report* 31 (additional views); *Senate Report* 34 (minority views), the revised version permitted the President to authorize acting service by an individual who had served in a senior position (defined as a position with a rate of pay equal to the minimum for GS-15 or higher) in the same agency where the vacancy arose, for at least 90 days in the year preceding

the vacancy. Omnibus Act § 151, 112 Stat. 2681-611 (5 U.S.C. 3345(a)(3)).

And responding to those who sought greater flexibility with regard to first-assistant service, the revised legislation adopted the language of Subsection (b)(1), at issue in this case. Senator Thompson, who was the Chairman of the relevant Committee and drafted the revised language, explained that the purpose of the revision was to reduce "the length of service prior to the onset of the vacancy that the first assistant must satisfy to be eligible to serve as the acting officer" pursuant to Subsection (a)(1) from 180 days to 90 days, if the first assistant was also nominated to fill the position on a permanent basis. 144 Cong. Rec. at 27,496. Senator Thompson expressly noted that "the revised reference to § 3345(a)(1)" in Subsection (b)(1) "means that this subsection applies *only* when the acting officer is the first assistant, *and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3).*" *Ibid.* (emphasis added).

5. Beginning immediately after its enactment, Subsection (b)(1) is construed to limit only first assistants

From the enactment of the FVRA until the court of appeals' decision here, Presidents of both parties have made acting designations and nominations without congressional objection on the understanding that Subsection (b)(1) constrains acting service only by first assistants pursuant to Subsection (a)(1) of 5 U.S.C. 3345, and not by officials designated by the President pursuant to Subsection (a)(2) or (a)(3). There have been more than 100 such nominees in the 18-year history of the FVRA, see App. A, *infra*, 1a-81a. And nominees

serving on the basis of the Executive's longstanding interpretation have been routinely confirmed by the Senate.

a. The Executive's interpretation was first articulated five months after the FVRA's enactment by the Office of Legal Counsel (OLC) in the Department of Justice. Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60 (1999). As noted, Subsection (b)(1) is set out as a limitation applicable "[n]otwithstanding subsection (a)(1)," which sets forth the general rule that the first assistant performs the functions and duties of a vacant PAS office. In view of that cross-reference, OLC interpreted Subsection (b)(1) as a limitation that "applies only to persons who serve as acting officers by virtue of having been the first assistant to the office"—*i.e.* only to persons who automatically assume acting status based on the general rule in Subsection (a)(1). *Id.* at 64. Thus, OLC concluded, the restriction in Subsection (b)(1) does not apply to a person already serving in another PAS office who is directed by the President to perform the duties of a vacant office under Subsection (a)(2), or to an official with at least 90 days service in a senior position in the same agency who is directed by the President to perform the duties of the vacant PAS office under Subsection (a)(3). *Ibid.*

The GAO, an instrumentality of Congress that plays a congressionally assigned role in the FVRA's enforcement, see 5 U.S.C. 3349, has likewise construed the requirements of Subsection (b)(1) as applicable only to first assistants who serve as acting officials under Subsection (a)(1). See Letter from Carlotta C. Joyner, Dir., Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental

Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R, at 3-4 (Feb. 23, 2001), http://www.gao.gov/assets/80/75036.pdf (Joyner).

b. Every President since the FVRA's enactment has made nominations of persons serving in an acting capacity under Subsections (a)(2) and (a)(3) in accordance with that construction.

For instance, within a year of the FVRA's enactment, President Clinton nominated David Ogden to fill the office of Assistant Attorney General for the Civil Division on a permanent basis. Ogden already was serving as Acting Assistant Attorney General for the Civil Division pursuant to Subsection (a)(3) based on his position as a senior official for at least 90 days elsewhere in the Department. He continued serving in that acting capacity while his nomination was pending, consistent with the OLC guidance, even though he had not been first assistant for 90 days in the year prior to the vacancy. After approximately 18 months of service in an acting capacity while his nomination was pending, Ogden was confirmed by the Senate in December 2000. See App. A, *infra*, 2a.

President Clinton also nominated and the Senate confirmed a number of other individuals who served as acting officials pursuant to Subsections (a)(2) and (a)(3) while their nominations were pending, including a Deputy Director of Central Intelligence, App. A, *infra*, 7a; a Deputy Secretary of Labor, *id.* at 2a; an Under Secretary of State, *id.* at 3a; and other high-level officials at multiple government departments. See *id.* at 2a-10a.

President George W. Bush relied on the same interpretation in making nominations of acting officials to fill various high-level posts across multiple departments—including numerous nominations that the Senate confirmed. See App. A, *infra*, 11a-60a. For example, officials who continued to serve in an acting capacity pursuant to Subsection (a)(2) or (a)(3) following nomination, and who were confirmed by the Senate, include Deputy Attorney General James Comey, *id.* at 19a, as well as officials in posts such as Commissioner of the Food and Drug Administration, *id.* at 30a; Secretary of the Air Force, *id.* at 55a; Director of the National Science Foundation, *id.* at 20a; President of the Export-Import Bank, *id.* at 27a; the head of the Federal Emergency Management Agency, *id.* at 28a; and Administrator of the U.S. Agency for International Development, *id.* at 43a.

That practice has continued to the present day. A number of high-level officials were nominated by President Obama and confirmed to PAS offices whose functions and duties they performed temporarily pursuant to Subsection (a)(2) or (a)(3) during the pendency of their nominations. Such officials included Deputy Attorney General Sally Q. Yates, App. A, *infra*, 75a; Deputy Secretary of Commerce Rebecca M. Blank, *id.* at 64a; Deputy Secretary of Transportation Victor M. Mendez, *id.* at 69a; and Deputy Secretary of Education James H. Shelton, III, *id.* at 68a, among numerous others, *id.* at 60a-81a.[3]

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[3] The petition for a writ of certiorari listed a number of agencies at which high-level decisions "could be open to question under the court of appeals' reasoning" concerning the FVRA. Pet. 27. This Office has subsequently learned that one of the agencies so identified, the General Services Administration (GSA), should have been

B. Proceedings In This Case

1. a. The National Labor Relations Board (NLRB or Board) is an independent agency charged with the administration of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* Its General Counsel is required by statute to be appointed by the President with the advice and consent of the Senate. 29 U.S.C. 153(d). The General Counsel has "final authority * * * in respect of" the issuance of complaints alleging that a person has committed an unfair labor practice. *Ibid.*; see 29 U.S.C. 160(b).

In June 2010, after the NLRB's General Counsel resigned, the President directed senior career NLRB official Lafe Solomon to serve temporarily as the Board's Acting General Counsel. Pet. App. 5a. Solomon satisfied the requirements for acting service under 5 U.S.C. 3345(a)(3) because he had served as the Director of the NLRB's Office of Representation Appeals, a senior position with a rate of pay equal to or greater than GS-15, for at least 90 days in the year preceding the vacancy. In fact, he had been in that position for the previous ten years. Pet. App. 11a.

In January 2011, the President nominated Solomon to serve as NLRB General Counsel on a permanent basis. Pet. App. 11a. Solomon's nomination was not acted upon during the 112th Congress, so it was returned to the President at the expiration of that Congress in accordance with Senate rules. 159 Cong. Rec. S17 (daily ed. Jan. 3, 2013). The President resubmitted Solomon's nomination in May 2013, but later with-

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omitted because the relevant official at GSA (the acting Administrator) was designated as acting pursuant to a GSA-specific provision, 40 U.S.C. 302(b).

drew it and put forward Richard Griffin, who was later confirmed. Pet. App. 6a.

b. In January 2013, while Solomon was performing the duties of the NLRB General Counsel on an acting basis, a Regional Director acting on the General Counsel's behalf issued a complaint alleging that respondent had committed an unfair labor practice. Pet. App. 7a. An administrative law judge (ALJ) determined that respondent had committed an unfair labor practice, and the NLRB agreed, adopting the recommended order of the ALJ with minor modifications. *Ibid.*

2. Respondent filed a petition for review in the United States Court of Appeals for the D.C. Circuit, and the NLRB filed a cross-petition for enforcement of its order. Pet. App. 7a; see 29 U.S.C. 160(e) and (f). Respondent argued that the complaint alleging an unfair labor practice had been unauthorized, because Solomon could not legally perform the duties of General Counsel after being nominated to fill that position permanently. Pet. App. 7a, 11a.

The court of appeals granted respondent's petition for review and vacated the Board's order. Pet. App. 1a-30a. Rejecting the Executive Branch's longstanding interpretation, the court concluded that the precondition in Subsection (b)(1) that a nominee must have been the first assistant to an office for 90 days during the year preceding the vacancy in order to serve temporarily in that office in an acting capacity applies not only to first assistants serving under Subsection (a)(1), but also to persons already serving in a PAS office in the Executive Branch who are directed by the President to perform the duties of a vacant PAS position under Subsection (a)(2), and to senior agency officials directed by the President to perform

the duties of a vacant PAS office in their agency under Subsection (a)(3). *Id.* at 20a.

The court of appeals believed that its conclusion was largely dictated by the FVRA's text, particularly the part of Subsection (b)(1) referring to a "person" serving as an acting official "under this section," which it surmised indicated that Subsection (b)(1) reached "the full spectrum of possible candidates for acting officer" under Section 3345. Pet. App. 12a (emphasis and citation omitted). The court rejected the government's argument that Subsection (b)(1)'s specification that it applies "[n]otwithstanding subsection (a)(1)" means that the subsection constrains only acting service by first assistants pursuant to Subsection (a)(1). *Id.* at 13a; see *id.* at 13a-15a. The court also disagreed that the statute's legislative history and purpose countermanded its reading of the text. *Id.* at 17a-20a.

Because "Solomon was never a first assistant and the President nominated him to be General Counsel on January 5, 2011," the court of appeals concluded that "the FVRA prohibited [Solomon] from serving as Acting General Counsel from that date forward." Pet. App. 20a. It therefore concluded that Solomon was not properly serving as Acting General Counsel when the unfair labor practice complaint was issued against respondent. The court also found that neither harmless-error principles nor the de facto officer doctrine rendered the unfair labor practice complaint valid regardless of whether Solomon's appointment violated the FVRA. *Id.* at 20a-30a.[4]

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[4] The court of appeals treated as waived any argument that even if Solomon's service as Acting General Counsel was prohibited while Solomon's nomination was pending, the unfair labor practice complaint here was validly issued because Solomon's acting service

3. The court of appeals denied rehearing en banc by a vote of 7-3, over the dissenting votes of Judges Brown, Kavanaugh, and Millett. Pet. App. 114a-115a.

SUMMARY OF ARGUMENT

The FVRA bars certain persons from performing on an acting basis the functions and duties of a vacant office for which Senate confirmation is required, if they are nominated to fill the same vacant position on a permanent basis, unless the person has previously served as the first assistant to the vacant office for at least 90 days. 5 U.S.C. 3345(b)(1). Beginning almost immediately after the FVRA's enactment, the Executive Branch has consistently interpreted this restriction to apply only to first assistants who automatically assume responsibility for performing the duties of the vacant office on a temporary basis, not other officials who are directed by the President to do so in lieu of the first assistant. Presidents of both parties have combined to make more than 100 nominations and designations premised on that understanding. The congressional instrumentality with a role in overseeing FVRA administration has agreed with that construction, and the Senate has routinely confirmed nominees put forward under this view of the statute—without any apparent objection before the decision below. The court of appeals erred in setting aside this longstanding interpretation of the FVRA, both because that interpretation accords with the statute's text, structure, and objectives, and because the settled practice of the Executive and Congress in applying a statute concern-

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was again legitimate in the period between when Solomon's nomination was returned and when it was resubmitted. Pet. App. 7a n.3.

ing allocation of power between those two Branches is entitled to great weight.

A. The Executive's longstanding reading of the FVRA best accords with its text and structure. The FVRA, in 5 U.S.C. 3345, sets out three separate mechanisms by which an official may perform the duties of a vacant PAS office. Subsection (a)(1) establishes the general rule that the first assistant to a vacant office automatically shall assume the responsibility for performing the duties of that office on a temporary basis. Subsection (a)(2) then establishes an exception to that otherwise categorical rule, providing that "notwithstanding paragraph (1)," the President instead may direct a person who already occupies a PAS office in the Executive Branch to perform the duties of the vacant office. And Subsection (a)(3) establishes another such exception, providing, again "notwithstanding paragraph (1)," that the President may direct another high-level official in the same agency to perform the duties of the vacant office.

Subsection (b)(1) then provides that "[n]otwithstanding subsection (a)(1)," a person may not serve in an acting capacity after being nominated to fill the office on a permanent basis, unless the person served as first assistant for 90 days before the vacancy arose. Congress's directive that the limits of Subsection (b)(1) take precedence over only one of three statutory mechanisms for acting service—the mechanism for service by a first assistant under Subsection (a)(1)—strongly suggests that Congress did not intend those limits to take precedence over the mechanisms for acting service by other officials that are set forth in Subsections (a)(2) and (a)(3). Thus, Subsection (b)(1), like Subsections (a)(2) and (a)(3), creates an exception to the rule

that the first assistant shall automatically accede to the responsibility for performing the duties of the vacant office. It does so by preventing such service if the first assistant is nominated to fill the position on a permanent basis, unless the official served as first assistant for 90 out of the 365 days prior to the occurrence of the vacancy.

This reading accords with the broader structure of the statute. It sensibly reads a restriction tied to first-assistant status and length of service as first assistant to pertain only to officials who are themselves first assistants. It ensures that all of the "notwithstanding" clauses in Section 3345 are read consistently with each other, as carving out an exception to the default rule that the first assistant shall perform the duties of the vacant office. And it is not countermanded by any of the other statutory language.

B. The Executive's longstanding interpretation also best accords with the FVRA's objectives. The FVRA was enacted in response to both perceptions that the Executive Branch had been circumventing the preexisting Vacancies Act framework (including through last-minute first-assistant appointments) and perceptions that the category-of-service restrictions in the preexisting framework afforded Presidents too little flexibility. The statute as enacted addressed both concerns. It expanded the categories of persons the President could direct to serve in an acting capacity. And it curbed the President's ability to manipulate the categories of officials eligible to perform acting service, by barring recently appointed first assistants from serving as both acting officers and nominees to fill the office on a permanent basis in cases where the first assistants were not themselves Senate-confirmed.

The court of appeals' interpretation of Subsection (b)(1) would disserve the FVRA's objectives. It would undermine the statute's goal of enabling service by the career officials that Members of Congress had described as especially qualified—by preventing such individuals from serving if the President also regarded them as most qualified to occupy the PAS position at issue on a permanent basis.

The court of appeals' interpretation likewise would not advance the statute's goal of preventing the Executive Branch from manipulating the categories of service authorized under the FVRA. That is because the FVRA already contains corresponding safeguards against manipulation for individuals other than the first assistants whose service is authorized pursuant to Subsection (a)(1). In particular, individuals designated under Subsection (a)(2), by necessity, *already* serve in an office that requires Senate confirmation. And senior agency officials designated under Subsection (a)(3), by necessity, have *already* served in a senior position at the relevant agency for at least 90 of the 365 days preceding the vacancy, satisfying the same length-of-service requirement that Congress imposed on first assistants under Subsection (b)(1) in order to avoid manipulation of the FVRA's categories of service. Congress thus had no reason to subject non-first-assistants directed by the President to perform the duties of the vacant office to the first-assistant-based restrictions in Subsection (b)(1).

C. The Executive's interpretation also best accords with the FVRA's legislative history. There is no dispute that in the version of the FVRA reported by the Senate Committee, Subsection (b)'s restriction applied only to first assistants. That version of the FVRA

could not survive a cloture vote, however, because a number of Senators thought that in a number of respects it gave the President too *little* flexibility in designating acting officials. That version was then revised to enlarge the pool of individuals eligible to be the acting official and to reduce the length of the time-in-service requirement for first assistants. It was in the process of making that change that the relevant text of Subsection (b) was adopted. This context weighs strongly against reading the change to the language of Subsection (b)(1) as a change that substantially restricted the Executive's designation authority, by stripping the President of longstanding power to designate officials already in PAS posts to perform the duties of vacant PAS positions on an acting basis. Tellingly, the Senator who authored the amended language (the Chairman of the Committee and the FVRA's chief sponsor) explained that by virtue of the "[n]otwithstanding subsection (a)(1)" language in Subsection (b)(1), the restriction contained in Subsection (b)(1) would apply only to first assistants who perform the duties of a vacant office under Subsection (a)(1), and specifically not to other officials who do so pursuant to Subsections (a)(2) and (a)(3). 144. Cong. Rec. at 27,496 (statement of Sen. Thompson).

D. The consistent manner in which the FVRA has been interpreted and applied since its enactment reinforces the plain text. Just two Terms ago, this Court emphasized that historical practice is entitled to significant weight in construing constitutional provisions that address the allocation of power between the President and Congress in filling vacant offices in the Executive Branch. *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014). Consideration of practice is even

more appropriate in construing a statute such as the FVRA that addresses that division of authority. The Senate may decline to confirm a nominee it believes is serving unlawfully, and Congress has both the incentive and ability to quickly correct by subsequent legislation any perceived encroachment on the allocation of powers that it intended the statute to accomplish.

The historical practice here strongly supports the Executive's interpretation. Soon after the FVRA's enactment, the Executive Branch set forth its understanding of Subsection (b)(1) in written guidance by OLC. The GAO, a congressional instrumentality with a statutory role in overseeing FVRA compliance, subsequently agreed with that position. And every President since the enactment of the FVRA has made personnel decisions in accordance with the Executive's view, through the designations and nominations of more than 100 high-ranking officials whose service would have been invalid under the court of appeals' interpretation. Insofar as we are aware, no Member of Congress has ever objected to such designations and nominations prior to the decision in this case. Indeed, the Senate has routinely confirmed acting officials whose simultaneous service as nominee and acting official would have been unlawful if the court of appeals' interpretation were correct. Particularly in the context of legislation designed to protect the Senate's institutional prerogatives vis-à-vis the President, the actions of the two Branches provide compelling support for the Executive's longstanding interpretation.

ARGUMENT

The court of appeals erred in setting aside the interpretation of the FVRA on which every President has acted, without objection from Congress, since the

enactment of the statute. The text, structure, purpose, and history of the statute each supports the Executive's understanding that Subsection (b)(1) of Section 3345 sets forth limits applicable only to first assistants who are serving pursuant to Subsection (a)(1)—and not to PAS officials serving pursuant to Subsection (a)(2) or senior agency officials serving pursuant to Subsection (a)(3). And the manner in which the FVRA has been understood and applied by the Executive, without objection by the Senate in considering the nominations of numerous officials serving in an acting capacity under Subsections (a)(2) and (a)(3), confirms the soundness of this understanding.

A. The Manner In Which The FVRA Has Been Understood Since Its Enactment Represents The Best Reading Of The FVRA's Text And Structure

This Court's interpretation of a federal statute "begins with the text," *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016), mindful that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012). Here, the text of Subsection (b)(1) demonstrates that the limitation contained in that provision sets a limit on acting service only by first assistants pursuant to Subsection (a)(1) of Section 3345, and does not constrain acting service of PAS officials and senior agency officials pursuant to Subsections (a)(2) and (a)(3).

1. The FVRA authorizes three classes of officials to temporarily perform the functions and duties of a vacant PAS office under 5 U.S.C. 3345. Subsection (a)(1) first provides, as a general rule, that a first assistant "shall perform" the functions and duties of a vacant PAS office temporarily, subject to time limits

specified elsewhere in the Act. 5 U.S.C. 3345(a)(1). Subsections (a)(2) and (a)(3) then provide two exceptions to that general rule. Subsection (a)(2) provides that, "notwithstanding paragraph (1)," the President (and only the President) may designate an individual who is already serving in another PAS office in the Executive Branch to perform the duties of a vacant office on a temporary basis. 5 U.S.C. 3345(a)(2). And Subsection (a)(3) provides that, "notwithstanding paragraph (1)," the President (and only the President) may designate an official in the agency where the vacancy has occurred, if that official holds a sufficiently senior post and has served in that senior post for at least 90 days. 5 U.S.C. 3345(a)(3).

Subsection (b)(1), which immediately follows the three provisions authorizing acting service, creates another exception to the otherwise categorical rule that the first assistant shall perform the duties of the vacant office. Subsection (b)(1) specifies that, "[n]otwithstanding subsection (a)(1)," a person who is nominated to fill a vacant PAS office on a permanent basis may not perform the functions and duties of that office in an acting capacity if he was not the office's first assistant for at least 90 days during the year preceding the vacancy. 5 U.S.C. 3345(b)(1). "Notwithstanding" clauses are commonly used when different statutes or statutory provisions contain directives that contradict each other, with Congress providing that one statute "is to apply 'notwithstanding' the provisions of another, specified statute or class of statutes," in order to dictate which contradictory provision is to prevail. Larry M. Eig, Cong. Research Serv., *Statutory Interpretation: General Principles and Recent Trends* 37 (2011). As the court of appeals put it, these

"notwithstanding" clauses set out an "order of operations" among conflicting provisions. Pet. App. 14a.

Here, Congress's decision to specify that the limits in Subsection (b)(1) apply only "[n]otwithstanding subsection (a)(1)" strongly indicates that Congress intended the first-assistant limitation in Subsection (b)(1) to override only the directive of automatic service by the first assistant contained in Subsection (a)(1). That is the function performed by the clause "notwithstanding paragraph (1)" in Subsections (a)(2) and (a)(3). If Congress had instead meant to subject all three mechanisms for identifying an acting official to Subsection (b)(1)'s requirement of 90 days of prior service as the first assistant, in order for the acting official to continue serving after being nominated to fill the position on a permanent basis, it could have straightforwardly provided that the limitation applies "[n]otwithstanding subsections (a)(1), (a)(2), and (a)(3)," or simply "[n]otwithstanding subsection (a)," which contains all three mechanisms. What Congress would *not* do if it wished to limit acting service under all three statutory subsections is direct that the limitations apply "[n]otwithstanding" only *one* of the them—"subsection (a)(1)."

The circumstances surrounding the enactment of the "notwithstanding" clause here make this conclusion particularly appropriate. Negative inferences that the expression of one item is intended to signal the exclusion of another are appropriate when the included and omitted items are both "members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (citation omitted); see Antonin Scalia and Bryan A. Garner, *Reading Law: The In-*

terpretation of Legal Texts 107-111 (2012) (Scalia & Garner) (discussing negative-implication canon); 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 47.23 (7th ed. 2014) (Singer) (same). And the "negative implications raised" when a statutory rule is made expressly applicable to only one provision are strongest when all the relevant provisions were "being considered simultaneously when the language raising the implication was inserted." *Lindh* v. *Murphy*, 521 U.S. 320, 329-330 (1997); see *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (same).

Applying these principles in *Lindh*, this Court held that when the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, set forth rules in Chapters 153 and 154 of Title 28 of the United States Code, and then provided that "'Chapter 154 . . . shall apply to cases pending on or after the date of enactment of this Act,'" the logical inference from Congress's words was that the amended Chapter 153 should *not* apply to cases already pending when the statute was enacted. 521 U.S. at 327 (citation omitted). It made little sense to imagine that Congress would have expressly mentioned only one chapter if it wanted both to apply in pending cases. *Ibid.* The same conclusion is called for here. Subsections (a)(1), (a)(2), and (a)(3) constitute an "associated group or series" immediately preceding Subsection (b)(1) in the statute. *Barnhart*, 537 U.S. at 168 (citation omitted). And Congress would have had every reason to have all three subsections providing for acting service "in mind," *Lindh*, 521 U.S. at 330, when it considered the "[n]otwithstanding subsection (a)(1)" limitation in Subsection (b)(1), because all three subsections providing for acting service and the limitation

in Subsection (b)(1) were considered and enacted by Congress at the same time.

Adjoining provisions in Section 3345 bolster this construction of Subsection (b)(1), particularly when read against the background principle that "identical words used in different parts of the same act" ordinarily "are intended to have the same meaning." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995) (citation omitted). Congress twice used the phrase "notwithstanding paragraph (1)" in Subsection (a), immediately preceding the parallel limiting clause in Subsection (b)(1). In each of those provisions, the clause makes clear that the provision overrides the rule of automatic accession by the first assistant in Subsection (a)(1)—thereby constraining operation of Subsection (a)(1) alone. 5 U.S.C. 3345(a)(2) and (3). Congress likewise used the "[n]otwithstanding subsection (a)(1)" formulation in Subsection (c) of 5 U.S.C. 3345 to override only the rule of automatic accession by the first assistant in Subsection (a)(1). Specifically, Congress provided in Subsection (c) that, "[n]otwithstanding subsection (a)(1)," the President may direct a person who is nominated by the President for reappointment to an additional term in the same office to continue to serve in that office until the Senate acts on the nomination. 5 U.S.C. 3345(c)(1). The Executive's interpretation of Subsection (b)(1) gives the same meaning and function to the directly parallel "notwithstanding" clauses referring solely to Subsection (a)(1) in each of the four relevant subsections in which that phrase appears.

This understanding of Subsection (b)(1) is further strengthened by the contrast between the narrow "[n]otwithstanding subsection (a)(1)" clause that Congress enacted as part of the FVRA and the much

broader "notwithstanding" clauses that Congress routinely utilizes—including in the public law in which the FVRA was enacted. Congress "frequently use[s]" the phrase "notwithstanding any other provision of law" to give a provision broad scope. Donald Hirsch, *Drafting Federal Law* 110 n.36 (2d ed. 1989); see Tobias A. Dorsey, *Legislative Drafter's Deskbook: A Practical Guide* 256 (2006) (acknowledging practice but recommending that drafters instead specify the precise provisions they intend to override). For instance, as part of the statute that enacted the FVRA, Congress specified in approximately 200 places that particular provisions were to apply "notwithstanding any other provision of law." See, *e.g.*, Omnibus Act, 112 Stat. 2681-27, 2681-28, 2681-29, 2681-34, 2681-37, 2681-45, 2681-46, 2681-53, 2681-54, 2681-55, 2681-59, 2681-64, 2681-66, 2681-67, 2681-68, 2681-70, 2681-74. Congress's choice to depart from that common formulation here, in a situation where use of such a formulation would have achieved respondent's reading of the statute, lends additional weight to the longstanding interpretation of the "notwithstanding" clause.

2. The court of appeals offered no persuasive reason why a Congress that sought to override Subsections (a)(1), (a)(2), and (a)(3), would have done so through a limitation made applicable "[n]otwithstanding subsection (a)(1)" alone. Nor did it identify textual features that justify setting aside the natural inference from the narrower "notwithstanding" language that Congress enacted. And the reasons that the court of appeals did posit are unpersuasive.

The court of appeals first suggested that the Executive's longstanding interpretation of Subsection (b)(1) is incorrect because the "ordinary, contemporary,

common meaning" of "notwithstanding," is "in spite of." Pet. App. 13a (citations omitted). But the Executive's longstanding interpretation is fully consistent with that meaning. It treats the "notwithstanding" clause as setting forth an order of operations in which Subsection (b)(1) applies "in spite of" Subsection (a)(1). And as this Court has explained, when a statute specifies that a command does control in one circumstance, it is appropriate to infer that the command does not control in other, unmentioned circumstances—so long as it is appropriate, as it plainly is here, to infer that Congress would have had each of the circumstances in mind when specifying the scope of the statutory command. See, *e.g.*, *Lindh*, 521 U.S. at 329-330; *Barnhart*, 537 U.S. at 168; Singer § 47.23; Scalia & Garner at 107-111.

The court of appeals also hypothesized that Congress "likely" specified that Subsection (b)(1) applies "[n]otwithstanding" only Subsection (a)(1), which directs acting service by first assistants, because that subsection uses the mandatory "shall," whereas Subsections (a)(2) and (a)(3) do not. Pet. App. 13a-14a. But that is no explanation. The word "shall" in Subsection (a)(1) is what makes the general rule of accession by the first assistant mandatory and automatic in the first place. 5 U.S.C. 3345(a)(1). Subsections (a)(2) and (a)(3) use the word "may" rather than "shall" because their operation is not automatic, but rather is conditioned on the President's choosing to invoke them. Once the President does so, however, those subsections are just as categorical as Subsection (a)(1) in directing the specified official to perform the office's functions and duties—an acting official assumes the same duties whether serving under Subsection

(a)(1), (a)(2), or (a)(3). If Congress had wanted to override the acting-service provisions in Subsections (a)(2) and (a)(3), by imposing the rule of 90 days of prior service as first assistant on nominees who did not even assume an acting capacity on a first-assistant basis, Congress surely would have needed to direct that Subsection (b)(1)'s rule applies "notwithstanding" those provisions, not just "[n]otwithstanding subsection (a)(1)."

The court of appeals also relied on other features of the statutory text, but each of those textual features is fully consistent with the longstanding interpretation of the FVRA applied by the Executive without objection from Congress. The court suggested that Subsection (b)(1) must constrain acting service under all three paragraphs in Subsection (a) because Subsection (b)(1)'s reference to limits on a "person" serving under "this section" (rather than a "first assistant" serving under "Subsection (a)(1)") is "irreconcilable" with the Executive's interpretation. Pet. App. 14a. There is no conflict. The first assistants described in Subsection (a)(1) to whom Subsection (b)(1) applies are, of course, "person[s]" who are serving under "this section," 5 U.S.C. 3345. Moreover, Subsection (b)(1) already indicates that it limits only first assistants serving under Subsection (a)(1)—by specifying that it applies "[n]otwithstanding subsection (a)(1)" rather than "[n]otwithstanding subsection (a)" or "[n]otwithstanding subsections (a)(1), (a)(2), and (a)(3)," and by specifying a precondition that would very rarely be satisfied by a person not serving as first assistant. There thus was no need for Congress to reiterate, using the court's preferred formulation, see Pet. App. 12a-13a, that the

affected persons were only those who are first assistants serving under Subsection (a)(1).

Indeed, Congress indisputably spoke of "person[s]" serving under the FVRA even when the universe of persons it was discussing consisted only of first assistants. It did so in the very next paragraph, when it declared that Subsection (b)(1) "shall not apply to any *person*" who meets specified statutory criteria that include current service as a "first assistant." 5 U.S.C. 3345(b)(2)(A) (emphasis added). As this provision demonstrates, there is no conflict between Congress's decision setting forth a rule in Subsection (b)(1) that applies only to first assistants, and Congress's use of the word "person."

The FVRA's evolution during the legislative process further demonstrates that Congress's use of "person" and "under this section" is fully consistent with the Executive's interpretation of Subsection (b)(1). The version of the FVRA that was reported by the Senate Committee contained a restriction on simultaneous nomination and acting service that, as the court of appeals acknowledged, "manifestly applies to first assistants only." Pet. App. 19a. Yet that version was the original source of the words "person" and "under this section" in what eventually became Subsection (b)(1). See *Senate Report* 25. Because those terms were simply carried over into the final version of the FVRA from a provision that unambiguously applied only to first assistants, it would be particularly inappropriate to infer that those terms reflected a congressional intent to apply Subsection (b)(1) beyond first assistants.

The court of appeals also doubly erred in suggesting that the Executive's interpretation—but not the

court's—would render other provisions of Section 3345 superfluous. Pet. App. 15a. The court reasoned that if Subsection (b)(1) were limited to first assistants, it would be superfluous for Subsection (b)(2) expressly to state that it applies only to a person who "is serving" as first assistant. *Id.* at 16a; see 5 U.S.C. 3345(b)(2)(A). But Subsection (b)(1) imposes a restriction based on brevity of *past* service as first assistant in the period "preceding" the vacancy, 5 U.S.C. 3345(b)(1)(A), while Subsection (b)(2) creates an exception to that restriction based on *current* service as a *Senate-confirmed* first assistant, 5 U.S.C. 3345(b)(2)(A). Given that contrast, it is entirely understandable that Congress would state with completeness the criteria for application of Subsection (b)(2), and clarify that it applies only to current, Senate-confirmed first assistants. Indeed, that structure makes the restriction in Subsection (b) as a whole (including the exception to that restriction in paragraph (2)) clear by making it entirely self-contained in its treatment of first assistants serving in an acting capacity who are also nominees. The canon against superfluity is therefore inapplicable. See *Marx* v. *General Revenue Corp.*, 133 S. Ct. 1166, 1176 (2013) (recognizing that statutory provisions are not superfluous when they add clarity).

The court of appeals also posited that the Executive's interpretation *could* create superfluity with regard to Subsection (b)(1)(A)(i), which triggers Subsection (b)(1)'s prohibition on a nominee performing the functions and duties of the vacant PAS office if the nominee "did not serve in the position of first assistant" at all in the year preceding the vacancy. Pet. App. 16a. It observed that "if subsection (a)(1) refers

to the first assistant at the time of the vacancy, then the condition in subsection (b)(1)(A)(i)—that the person 'did not serve in the position of first assistant to the office' in the prior 365 days—is inoperative because the current first assistant *necessarily* served as the first assistant in the previous year." *Ibid.* The court acknowledged, however, that Subsection (b)(1)(A)(i) is not superfluous if Subsection (a)(1) authorizes service by individuals who became the first assistant after the vacancy arose. *Ibid.*

As both OLC and GAO have concluded, that is the correct reading of Subsection (a)(1). Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177 (2001); Letter from Victor S. Rezendes, Managing Dir., Strategic Issues, *Changed Interpretation of Requirements Related to First Assistants Under the Federal Vacancies Reform Act of 1998*, GAO-02-272R (Dec. 7, 2001), http://www.gao.gov/assets/80/75053.pdf. Because Subsection (a)(1) authorizes acting service by any person who serves as "the first assistant *to the office of*" the officer who resigned, 5 U.S.C. 3345(a)(1) (emphasis added), the provision by its terms allows acting service by an individual who is named first assistant to a particular PAS office even if the office is already vacant when he is named and there is no "officer" in the position. A contrary interpretation would "render[] the words 'to the office' meaningless"—a result that would be "particularly troublesome given that the [FVRA] specifically modified the old Vacancies Act by replacing the phrase 'to the officer' with the phrase 'to the office.'" 25 Op. O.L.C. at 180.

In any event, the court of appeals also erred in invoking the canon against superfluities because its own interpretation of the FVRA creates superfluities. The

court's interpretation of the "[n]otwithstanding subsection (a)(1)" clause not only fails to accord that language its natural meaning, but also renders that specific language superfluous. At a minimum, that shows that the court erred in believing that the canon against superfluities counsels against adhering to the understanding of the FVRA that has prevailed since the statute was enacted. See *Marx*, 133 S. Ct. at 1177 ("[T]he canon against surplusage assists only where a competing interpretation gives effect to every clause and word of a statute.") (citation and internal quotation marks omitted). Ultimately, when the "[n]otwithstanding" clause of Subsection (b)(1) is given its natural reading, and is considered in context, the Executive's interpretation of the statute is on by far the firmest textual ground.

B. While The Settled Construction Of The FVRA Accords With The Statute's Design, The Court Of Appeals' Reading Creates Anomalies

The longstanding construction of Subsection (b)(1) is also superior to respondent's construction as a matter of statutory design, because it furthers the FVRA's recognized objectives, while the court of appeals' reading creates anomalies and asymmetries.

1. The FVRA was enacted following appointment controversies in which a number of Senators expressed the view that Presidents were circumventing the framework for designating officials set out in the Vacancies Act. See, *e.g.*, 144 Cong. Rec. at 12,432 (statement of Sen. Thompson); *id.* at 12,434 (statement of Sen. Thurmond). Presidents of both parties had invoked agencies' general statutory authorities to make designations without regard to the Vacancies Act's time limits and qualifications for acting service, draw-

ing widespread protest. See pp. 6-8, *supra*. And the then-current Administration had drawn particular ire by installing Bill Lann Lee into acting service when he had been named a "first assistant" only after the vacancy in the PAS position arose—a maneuver that was widely criticized as an evasion of the Vacancies Act's qualifications for service. See pp. 7-8, *supra*. At the same time, however, the Executive Branch and a number of Senators argued that the initial proposal to end these types of designations was too inflexible in its time limitations and category-of-service restrictions.

The FVRA was enacted the year following that controversy. It balanced the objective of preventing perceived circumvention of Vacancies Act requirements with the goal of ensuring effective execution of high-level government offices during vacancies. Thus, responding to the practices that had been criticized as circumventions of the Vacancies Act, the FVRA prohibits the use of general agency authorities as a basis for acting designations outside the FVRA. And it curtails Presidents' ability to elevate their chosen nominees to PAS positions on an acting basis through designations as first assistants occurring only after (or soon before) the PAS vacancy arose—thereby cutting off an avenue for "manipulat[ing]," *Senate Report* 13, or "gam[ing]," 144 Cong. Rec. at 12,432 (statement of Sen. Thompson on behalf of sponsors), the FVRA's restrictions on categories of individuals qualified to serve. At the same time, however, the FVRA as enacted expands the categories of those authorized to serve beyond those who would have been permitted under the pre-existing Vacancies Act and the bill reported by the Senate Committee. It authorizes act-

ing service by senior agency officials, who a number of Senators had suggested were actually best qualified to lead an agency in transition. And it extends the duration of permissible acting service from the periods allowed under the Vacancies Act and under the FVRA as initially proposed.

2. While the Executive's longstanding construction of Subsection (b)(1) interprets the statute in a manner consistent with the objectives of the Congress that enacted it, the court of appeals' reading would introduce anomalies that would undermine the statute's design.

a. The court of appeals' reading would substantially undercut the FVRA's objective of providing the President with a measure of added flexibility in acting designations. The court's reading would have a particularly implausible effect on PAS officials who serve in an acting capacity in vacant PAS positions pursuant to a directive by the President under Subsection (a)(2). The court would read Subsection (b)(1) to have *rescinded* the President's longstanding authority to designate such officials to serve in an acting capacity in virtually every instance in which the President concludes that an official would also make the best nominee. But for almost a century and a half under the Vacancies Act, the President had, without controversy, possessed the power to designate PAS officials to perform those roles while serving as nominees. No Senator had proposed rescinding that authority. This Court should hesitate to conclude that Congress—without comment or complaint—eliminated this longstanding presidential authority.

Second, the court of appeals' reading would substantially undercut Subsection (a)(3), which sought to expand the pool of individuals eligible for acting ser-

vice in order to give the President "more flexibility," in service of the "ultimate goal" of "ensur[ing] the most qualified individual available fills the position." *Senate Report* 31 (additional views); see *id.* at 35 (minority views). Under the court of appeals' view, Congress expanded the categories of officials eligible for acting service to serve that objective, by allowing the President to direct a senior official to perform the duties of the vacant PAS office on an acting basis—but then imposed a requirement in Subsection (b)(1) that would essentially disqualify such officials from serving if the President concluded (as he did in this case) that such an official was so highly qualified that the official would also be the appropriate permanent choice. The court of appeals' construction thus would require that officials with deep agency ties cease performing the functions and duties of vacant PAS offices precisely because they had been deemed most competent to fill the positions permanently.

An example illustrates the point. In September 2005, the head of the Federal Emergency Management Agency (FEMA) resigned while that agency was in the midst of Hurricane Katrina relief efforts. See Richard W. Stevenson, *After Days of Criticism, Emergency Director Resigns*, N.Y. Times, Sept. 13, 2005, at A26. FEMA had no permanent Deputy Director at the time, and the President turned during the emergency to R. David Paulison to be FEMA's acting head. Paulison was a highly-experienced emergency responder who had served as the Senate-confirmed Administrator of the Fire Administration since 2001. Spencer S. Hsu & Christopher Lee, *Paulison Is Skilled at Disasters*, The Washington Post, Sept. 13, 2005, at A12; 147 Cong. Rec. 23,666 (2001).

The President later nominated Paulison to be FEMA's full-time director, and he was unanimously confirmed without controversy. See 152 Cong. Rec. 9944 (2006). Under the court of appeals' view, the President either had to select someone else to lead FEMA through some or all of its significant post-Katrina challenges, or had to decline to nominate Paulison to the post on a permanent basis.

The FEMA post is not unique for presenting urgent and sensitive needs to fill important PAS offices. Presidents would be confronted with the same Hobson's choice with regard to experienced senior officials in high-level posts concerning defense, intelligence, and diplomacy—posts for which Presidents thus far have consistently relied on FVRA authorities to make senior officials both acting designees and nominees. See App. A, *infra*, 1a-81a.

Third, extending the first-assistant-focused restrictions of Subsection (b)(1) to PAS officials serving under Subsection (a)(2) and senior agency officials serving under Subsection (a)(3) would result in strange asymmetries. In particular, it would yield the perplexing result that a person already serving in a *Senate-confirmed* office who is designated to fill another PAS office in an acting capacity under Subsection (a)(2) can virtually never be both the acting official and nominee to that office—even though a *non*-Senate-confirmed first assistant (who is often a political appointee) can *always* be both the acting PAS official and nominee so long as he was in his first-assistant post 90 days before the vacancy arose.

b. Congress undoubtedly also sought in enacting the FVRA to curtail what it considered to be "manipulation" or "gam[ing]" of the categories of individuals

that Congress had authorized to serve on an acting basis—a concern that came to the fore with the eleventh-hour first-assistant designation of Bill Lann Lee and his subsequent renomination. *Senate Report* 13; 144 Cong. Rec. at 12,432. Congress responded by targeting first-assistant appointments in which the risk of manipulation was greatest—barring a newly-appointed first assistant from serving in an acting capacity only when the first assistant was also the Executive's nominee to fill the position permanently, 5 U.S.C. 3345(b)(1), and even then only when the first assistant was not himself or herself within the category of *presidentially appointed and Senate-confirmed* first assistants whose elevation was especially unlikely to be an attempt to bypass the Senate, 5 U.S.C. 3345(b)(2).

But respondent's interpretation of the FVRA cannot be supported based on that anti-circumvention objective, because Subsections (a)(2) and (a)(3) contain their own corresponding limitations tailored to the designation authority of the President in those paragraphs. Under Subsection (a)(3), an official who has served in a sufficiently senior position at the same agency for at least 90 days during the year preceding the PAS vacancy already meets length-of-service requirements equivalent to those that Subsection (b)(1) imposes on first assistants as a condition to their serving in an acting capacity after they have been nominated by the President. Similarly, because an official directed to perform temporarily the duties of a vacant PAS office under Subsection (a)(2) *already* serves in a PAS position, that official is unlikely to have been directed to do so in an attempt to circumvent the Senate's advice-and-consent role. Indeed, such officials—

who had been permitted to perform acting functions for well over a century—are much like the Senate-confirmed first assistants who are allowed to serve as acting PAS officers by virtue of Subsection (b)(2), without satisfying the requirement of 90 days' service as first assistant prior to the vacancy.[5]

In opposing certiorari, respondent hypothesized (Br. in Opp. 19) an alternative objective for the statutory scheme that respondent asserted would be advanced by its view: impeding the President from "advancing his agenda" until Senate confirmation was obtained. That account suffers from several problems. First, it is without foundation in the history surrounding the FVRA. A number of Senators expressed concern that the Vacancies Act regime in place prior to enactment of the FVRA was too inflexible, so that the President should be given the opportunity to choose among additional classes of acting officials; but no Member of Congress articulated the opposite objec-

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[5] The Ninth Circuit speculated that the designation of "a prior Senate-confirmed officer * * * could just as easily be used for 'manipulation' as a first assistant of insufficient tenure." *Hooks* v. *Kitsap Tenant Support Servs.*, 816 F.3d 550, 561 (2016). That is not so. A Senate-confirmed official, even at another agency, has been found by the Senate to be qualified to serve in a high-ranking government position. That check is one that Congress for almost 150 years had regarded as sufficient to support acting service under the Vacancies Act, see 5 U.S.C. 3347 (1994), without apparent concerns of manipulation. Moreover, because the President does not have a free hand to make an eleventh-hour appointment to a position within this category for the purpose of establishing acting-service eligibility, such positions are not susceptible to the type of post-vacancy manipulations that gave rise to congressional protest concerning first assistants.

tive of impeding the President's oversight of the Executive Branch.

Beyond this, respondent's hypothesis is not a plausible account of the statute's operation, because it does not account for the disparities in treatment that respondent's reading of the statute would produce. Under respondent's view, Subsection (b)(1) does not categorically bar the President from "advancing his agenda" by putting into place his nominee as an acting official. Instead, it permits the President to designate an official as both an acting PAS official and a nominee if he falls within a subset of first-assistant designees under Subsection (a)(1)—all those who had 90 days of service as the first assistant before the vacancy arose. See 5 U.S.C. 3345(b)(1)(A). But appointees in first-assistant posts are no less likely to have close connections to Presidents and their agendas than the senior career agency officials whose acting service is authorized under Subsection (a)(3).

In addition, respondent's hypothesis that Congress sought to impede the President's oversight of duties performed by persons acting in vacant PAS positions is difficult to reconcile with the FVRA's expansion of the class of officers from which the President could select acting designees. By significantly increasing the pool of officials from whom the President could draw in identifying new leaders of an executive agency, that provision enhances the President's ability to "advanc[e] his agenda" through acting officers prior to Senate confirmation. Br. in Opp. 19. Respondent's reading of Subsection (b)(1) would result in potentially disruptive leadership changes, because it would force PAS officers serving under Subsection (a)(2) and senior agency officials serving under Subsection (a)(3) to step down

from acting service in those instances in which the President finds no preferable outside candidate and nominates the official to fill the post permanently. Or it would force the President to choose another nominee entirely. But it would not deprive the President of the ability to select acting designees the President believes are closely aligned with his goals.

B. The Settled Construction of the FVRA Best Accords With The Statute's Legislative History

The history of the FVRA's development confirms the soundness of the Executive's longstanding understanding of the statutory text, structure, and purposes.

When the FVRA bill was reported out of committee, it indisputably imposed no limit of the kind respondent would locate in Subsection (b)(1). It contained what was enacted as Subsection (a)(1), directing that the first assistant would automatically assume the acting role in a vacant PAS office, but further allowed the President, in what was enacted as Subsection (a)(2), to instead direct another person already serving in a PAS office to perform the duties of the vacant position on an acting basis. See *Senate Report* 25. That bill also contained, in Subsection (b), a restriction on acting service during the pendency of a nomination that explicitly applied *only* to recently appointed first assistants—the class that had raised concerns regarding circumvention and manipulation of the Vacancies Act in the first place. See *ibid.* (proposing minimum term of 180 days prior service as first assistant to avoid the bar, rather than the 90-day minimum in the version as enacted).

The amended version of the bill—containing the language at issue here—was the product of a determination to give the President *greater* flexibility in des-

ignating officials to perform the duties of vacant offices on a temporary basis. After the FVRA bill was reported out of the Senate Committee, numerous Senators objected that the bill did not give the President sufficient choice concerning acting officials. See, *e.g.*, *Senate Report* 31 (additional views of Sens. Glenn, Levin, Lieberman, Cleland, and Torricelli). They urged two changes relevant here: one to add a category of senior agency officials who could serve in a vacant PAS office in an acting capacity, and the other to shorten "the length of service requirement for first assistants who are nominees." *Ibid.* Senators reiterated these concerns in floor debates, successfully defeating cloture because the bill did not contain such flexibility-enhancing provisions. See 144 Cong. Rec. at 22,512-22,514 (statement of Sen. Levin); *id.* at 22,515-22,518 (statement of Sen. Durbin); *id.* at 22,519-22,520 (statement of Sen. Glenn); *id.* at 22,524-22,525 (statement of Sen. Lieberman); *id.* at 22,526 (failed cloture vote).

The modifications made to the proposed FVRA thereafter were designed to accommodate these Senators' objections. Those amendments added Subsection (a)(3), which allows the President to designate as an acting PAS official an individual who had served in a senior position in the agency where the vacancy arose for at least 90 days in the year preceding the vacancy. And they reduced from 180 days to 90 days the time-in-service requirement in Subsection (b) for first assistants who are also nominees. It makes little sense to think that amendments put forward for these purposes were also intended to *expand* the restriction in Subsection (b)(1).

The explanation in the Senate confirms that the flexibility-enhancing amendments were not designed to have any such effect. After the bill was reported by the Senate Committee, Senator Thompson, the Chairman of the Committee and lead sponsor of the bill, submitted a floor amendment that would have revised Subsection (b) to read essentially as it was finally enacted, reducing the length-in-service requirement from 180 days to 90 days. 144 Cong. Rec. at 22,015. During the debate on cloture, Senator Glenn stated that he intended to offer amendments to add essentially what became Subsection (a)(3) and to "further decrease" the time-in-service requirement "for a *first assistant* who will be an acting officer and the nominee to 45 days." 144 Cong. Rec. at 22,519 (emphasis added).

After the cloture vote failed—with Senator Glenn and others who wanted flexibility-enhancing amendments voting against cloture—the FVRA's sponsors put forward a compromise combining elements of the two flexibility-enhancing proposals, which contained the language ultimately enacted as Subsection (b)(1). In identifying the changes made by the revised bill as it was added to the broader legislation, Senator Thompson stated that the 180-day period in Subsection (b) "governing the length of service prior to the onset of the vacancy that the *first assistant* must satisfy" was reduced from 180 days to 90 days. 144 Cong. Rec. at 27,496 (emphasis added). And Senator Thompson expressly explained that "the revised reference to § 3345(a)(1)" in Subsection (b)(1) "means that this subsection applies *only* when the acting officer is the first assistant, *and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2)*

or 3345(a)(3)." *Ibid.* (emphasis added). That is exactly the Executive's longstanding interpretation—and it is one that every President since the statute's enactment has acted upon in submitting nominations to the Senate, without complaint by the Senate in considering and often confirming nominees.

The court of appeals rejected the legislative history as unilluminating, pointing to a description of the provision by Senator Byrd in a floor statement. Pet. App. 17a-19a; see 144 Cong. Rec. at 27,498 (stating that under the revised bill, "a person may not serve as an acting officer if: (1)(a) he is not the first assistant, or (b) he has been the first assistant for less than 90 of the past 365 days, and has not been confirmed for the position; and (2), the President nominates him to fill the vacant office"). But that vague language does not specifically mention Subsections (a)(2) or (a)(3) or either the PAS appointments or the career appointments at issue in this case, and thus offers little guidance here. In any event, Senator Byrd was not the author of the language he was addressing, and his statement is accordingly entitled to substantially less weight. Cf. *Corley* v. *United States*, 556 U.S. 303, 318 (2009) ("[A] sponsor's statement to the full Senate carries considerable weight."). And Senator Thompson's explanation is strongly supported by the background of the language he introduced, while the court of appeals' understanding of Senator Byrd's statement does not accord with that background.

D. The Manner In Which The FVRA Has Been Understood Since Its Enactment Confirms The Meaning Of The Plain Text

The uniform practice of Presidents and the Senate from the time of the FVRA's enactment confirms

that Subsection (b)(1)—in line with the natural reading of the "notwithstanding" clause and its author's explanation—limits only the automatic service of first assistants in vacant PAS offices.

1. This Court has explained that it is appropriate to "put significant weight upon historical practice" in interpreting constitutional provisions that "concern the allocation of power between two elected branches of Government." *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (emphasis omitted). The grounds for giving weight to historical practice in this statutory case involving the allocation of power between the two elected Branches are even stronger, because not only can the Senate reject nominees it concludes are serving unlawfully, but Congress has ample incentive and ability to enact new legislation to displace an interpretation by the Executive that it sees as trenching on its prerogatives. Cf. *Watson* v. *United States*, 552 U.S. 74, 82-83 (2007) (deeming a 14-year period, in which Congress did not attempt to overrule this Court's interpretation of a statute, to be a "long congressional acquiescence" that enhanced the usual precedential force accorded this Court's statutory interpretations).[6] Indeed, Congress has consistently used these

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[6] Consideration of the contemporaneous exposition of a statute's meaning by those called upon to act under the law has a longstanding pedigree in the statutory context, starting with this Court's statement in *Edwards' Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206 (1827), that "[i]n the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." *Id.* at 210; see *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 315 (1933) (stating that administrative practice "has peculiar weight when it involves a contemporaneous construction of a statute by the men

mechanisms and others to safeguard its prerogatives concerning appointments. For instance, when Members of Congress perceived the Executive Branch to be violating the limitations of the Vacancies Act, they demanded explanations, solicited reports from congressional watchdog entities, held hearings, and ultimately proposed and passed legislation addressing their concerns. See pp. 6-10, *supra*.

2. The FVRA's allocation of power between the Executive and Congress is illuminated by the unusually clear and contemporaneous record of how the statute was understood by both those Branches. That understanding is reflected in written documents and unbroken practice. OLC and the GAO, the congressional instrumentality with a formal role in the FVRA's enforcement scheme, see 5 U.S.C. 3349, have each set forth the understanding that the limits of Subsection (b)(1) apply only to first assistants, with OLC doing so in written guidance shortly after the statute was enacted and the GAO doing so in a letter concerning FVRA enforcement in 2001. 23 Op. O.L.C. at 64 (1999); Joyner 3-4.

The GAO's approach is of particular note because the GAO has routinely identified and criticized designations and related actions that it regards as contrary to statutory mandates—both before and after the enactment of the FVRA. See, *e.g.*, GAO, *Violation of the 210-Day Limit Imposed by the Vacancies Reform Act* (Mar. 18, 2002), http://www.gao.gov/assets/80/75124.pdf (concluding that the Acting General Counsel

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charged with the responsibility of setting its machinery in motion"); see also, *e.g.*, *Schell's Ex'rs* v. *Fauché*, 138 U.S. 562, 572 (1891); *United States* v. *Hill*, 120 U.S. 169, 182 (1887); *United States* v. *Alabama Great S. R.R.*, 142 U.S. 615, 621 (1892).

in the Department of Agriculture had been improperly designated as acting, and had served in excess of the FVRA's time limits); GAO, *Violation of the 210-Day Limit Imposed by the Federal Vacancies Reform Act of 1998* (July 12, 2006), http://www.gao.gov/assets/80/75113.pdf (concluding that an Acting Assistant Secretary of Commerce had served in violation of the FVRA's time limits); GAO, *Homeland Security: DHS's Actions to Recruit and Retain Staff and Comply with the Vacancies Act* (July 2007), http://www.gao.gov/assets/270/264033.pdf (identifying deficiencies in DHS's procedures for Vacancies Act compliance); see also *CRS Validity Memo* 4 (noting that during controversies about acting designations prior to the enactment of the FVRA, the Comptroller General, who heads the GAO, challenged the Executive Branch's understanding of its designation authorities with "persistence and consistency"); *Vacancies Act Hearing* 152 (testimony of Comptroller General noting that GAO has "often been called upon by Members of Congress to issue opinions concerning officials who are serving in 'acting' capacities in various Executive departments or agencies without Senate confirmation").

The understanding reflected in the statements of OLC and the GAO is reinforced by unbroken practice under the FVRA. Beginning immediately after the statute was enacted, and continuing to the present, Presidents have directed officials to perform the duties of vacant offices pursuant to Subsections (a)(2) or (a)(3), and also nominated those same officials for permanent appointment to those offices, even when those officials had not been first assistants for at least 90 days preceding the vacancy. By the government's

tally there have been more than 100 such designations and nominations since the FVRA was enacted, made by all three Presidents subject to the statute. See App. A, *infra*, 1a-81a.

Those designations have covered a wide range of significant offices in departments and agencies throughout the Executive Branch. They have included key defense and national security nominees (including a Deputy Director of Central Intelligence, a Deputy Secretary of Defense, a Secretary of the Air Force, an Under Secretary of the Treasury for Terrorism and Financial Intelligence, heads of the National Nuclear Security Administration, and a head of the Transportation Security Administration); numerous agency heads (such as an Administrator of the U.S. Agency for International Development, an Administrator of the Small Business Administration, two directors of the Office of Personnel Management, and a Director of the National Science Foundation), and high-ranking officials in the Department of Justice (including three Deputy Attorneys General, three Associate Attorneys General, a Director of the Marshals Service, and two Directors of the Bureau of Alcohol, Tobacco, Firearms and Explosives).

The nominees' acting service and prior posts are part of the record routinely placed before the Senate in connection with the confirmation process, in testimony and questionnaires. See, *e.g.*, *Nominations of David W. Ogden of Virginia and Robert Raben of Florida, Each to be Assistant Attorney General for the Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong., 1st Sess. 19-21, 28 (1999) (committee testimony); *Confirmation Hearing on the Nomination of James B. Comey, Jr., of*

New York, to be Deputy Attorney General, Department of Justice: Hearing Before the Senate Comm. on the Judiciary, 108 Cong., 1st Sess. 7-8 (2003) (committee questionnaire); *Nominations to the Department of Transportation, the National Aeronautics and Space Administration and the Department of Commerce: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 110th Cong., 1st Sess. 7-8, 16-18 (2007) (committee questionnaire); *Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services*, 111th Cong., 1st Sess. 838, 889 (2009) (committee testimony and committee questionnaire).

Indeed, Senators sometimes introduce nominees at confirmation hearings by noting their simultaneous acting service. See, *e.g.*, *Confirmation Hearing on the Nominations of Daniel J. Bryant to be Assistant Attorney General, Office of Legal Policy, Department of Justice and Rene Alexander Acosta to be Assistant Attorney General, Civil Rights Division, Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong., 1st Sess. 3 (2003) (statement of Sen. Allen); *Nominations of the 108th Congress: Hearing Before the Senate Comm. on Environment and Public Works*, 108th Cong., 2d Sess. 1 (2004) (statement of Sen. Inhofe); *Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services*, 111th Cong., 1st Sess. 838 (2009) (statement of Sen. Levin); *Nominations to the U.S. Department of Commerce and the Federal Trade Commission: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 112th Cong., 1st Sess. 2-4 (2011) (statements of Sens. Rockefeller, Lautenberg, and Hutchison). And Presi-

dents frequently issue public notices stating that a nominee is also performing the duties of the vacant office in an acting capacity.[7]

As far as the government is aware, the Executive's consistent and oft-invoked interpretation never prompted objection from the Senate—or even an individual Senator—prior to the decision below.[8] Instead, across three Administrations, the Senate has regularly confirmed nominees whose simultaneous service as acting officer and nominee would have violated the FVRA under respondent's view. This unbroken practice deserves significant weight in construing the FVRA's allocation of power between Congress and the President. The understanding reflected in that practice—

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[7] See, *e.g.*, The American Presidency Project, George W. Bush, *Personnel Announcement* (Apr. 15, 2005), http://www.presidency.ucsb.edu/ws/?pid=81783 (statement announcing President's intention to nominate Raymond Simon to be Deputy Secretary of Education, and to designate him as the acting official for the same position); The American Presidency Project, George W. Bush, *Personnel Announcement* (Apr. 27, 2006), http://www.presidency.ucsb.edu/ws/?pid=82393 (statement announcing President's intention to nominate James B. Lockhart III to be Director of the Office of Federal Housing Enterprise Oversight, and also to designate him as the acting official for that position); Press Release, Office of the Press Secretary, The White House, *President Obama Announces More Key Administration Posts* (Sept. 20, 2012), https://www.whitehouse.gov/the-press-office/2012/09/20/president-obama-announces-more-key-administration-posts (press release announcing President's intention to nominate Tony West to be Associate Attorney General, and also indicating his then-current acting service in that role).

[8] Following the decision below, several Senators, in light of the decision, have called into question the service of a few acting officials who were nominated to fill on a permanent basis the positions that they occupied on an acting basis. See Pet. 28-29.

which is consistent with the statute's text, structure, purposes, and history—should be sustained.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2016

APPENDIX A

Officials Whose Acting Service Under 5 U.S.C. 3345(a)(2) or (a)(3) Would Have Been Unlawful Under The Court of Appeals' Decision[1]

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[1] All nominations and confirmations can be found at https://www.congress.gov/nominations. Where an individual was nominated multiple times to fill the same vacancy, only the first nomination date is provided. Designations cited in this appendix are on file with the Office of the Solicitor General. For each acting official, the materials in the footnote establish that the individual who served in an acting capacity was not the first assistant to the vacant post for at least 90 days in the year preceding the vacancy. This chart does not include nominees designated to perform the functions and duties of a vacant office under the FVRA if the agency at which the vacancy arose was unable to determine what position would have qualified as first assistant to the vacant PAS post at the time of the acting designation, and could not otherwise rule out that the designee served at least 90 days as first assistant in the year preceding the vacancy.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
David W. Ogden[2]	Assistant Attorney General (Civil)	2/1/99	6/10/99	Attorney General's Chief of Staff	12/15/00
Edward B. Montgomery[3]	Deputy Secretary of Labor	5/13/99	1/24/00	Counselor to the Secretary of Labor	5/24/00

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[2] Memorandum from William J. Clinton for David W. Ogden (Feb. 1, 1999) (designation and prior position); *Nominations of David W. Ogden, of Virginia; and Robert Raben, of Florida, Each to be Assistant Attorney General for the Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong., 1st Sess. 19, 20, 22 (1999) (prior positions); 28 C.F.R. 0.132 (1999) (explaining that in the absence of a designation by the Attorney General, the ranking or principal deputy to a position is its first assistant).

[3] Memorandum from William J. Clinton for Edward B. Montgomery (May 13, 1999) (designation); *Curriculum Vitae, Hon. Edward B. Montgomery*, http://www18.georgetown.edu/data/people/ebm48/cv.pdf (prior positions). The Department of Labor informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Alan Philip Larson[4]	Under Secretary of State (Economic, Business, and Agricultural Affairs)	8/17/99	10/8/99	Assistant Secretary of State (Economic and Business Affairs) (Senate Confirmed)	11/19/99
Mary Lou Leary[5]	Assistant Attorney General (Justice Programs)	2/25/00	9/22/00	Deputy Associate Attorney General & Chief of Staff to the Associate Attorney General	

[4] Memorandum from William J. Clinton for Alan Philip Larson (Aug. 17, 1999) (designation and prior position); Office of the Historian, Dep't of State, *Alan Philip Larson*, https://history.state.gov/departmenthistory/people/larson-alan-philip (last visited Aug. 12, 2016)(prior position). The State Department informs this Office that at the relevant time, this position had no first assistant.

[5] Memorandum from William J. Clinton for Mary Lou Leary (Feb. 25, 2000) (designation and prior position); Press Release, Office of the Press Secretary, The White House, *President Clinton Names Mary Lou Leary as Acting Assistant Attorney General in the Office of Justice Programs at the Department of Justice* (Feb. 7, 2000), http://

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Marjory E. Searing[6]	Assistant Secretary of Commerce and Director General of the U.S. and Foreign Commercial Service	3/13/00	6/30/00	Deputy Assistant Secretary of Commerce (Asia Pacific)	12/15/00

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clinton6.nara.gov/2000/02/2000-02-07-president-names-leary-to-department-of-justice.html (prior positions); Senate Comm. on Governmental Affairs, 106th Cong., 2d Sess., *Policy and Supporting Positions* 146-147 (Comm. Print 2000) (*2000 Plum Book*) (structure of the Office of General Counsel) (showing that none of Leary's prior positions were within the Office of Justice Programs).

[6] Memorandum from William J. Clinton for Marjory E. Searing (Mar. 13, 2000) (designation and prior position); *Nominations of Richard Court Houseworth, Nuria I. Fernandez, Marjory E. Searing, and Robert S. LaRussa: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 106th Cong., 2d Sess. 62 (2000) (prior positions); Dep't of Commerce, Department Organization Order (DOO) 40-1, Amend. 5 (issuance date Nov. 16, 1998) (on file with the Office of the Solicitor General) (indicating that the first assistant was the Deputy Director General of the U.S. Foreign and Commercial Service).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Judith A. Winston[7]	Under Secretary of Education	3/13/00	7/13/00	General Counsel, Department of Education (Senate Confirmed)	
Robert S. LaRussa[8]	Under Secretary of Commerce (International Trade)	5/11/00	5/25/00	Assistant Secretary of Commerce (Import Administration) (Senate Confirmed)	12/15/00

[7] Memorandum from William J. Clinton for Judith A. Winston (Mar. 13, 2000) (designation and prior position); Press Release, Office of the Press Secretary, The White House, *President Clinton Names Judith A. Winston as Under Secretary at the Department of Education* (Dec. 27, 2000), http://clinton6.nara.gov/2000/12/2000-12-27-winston-named-as-under-secretary-at-department-of-education.html (prior positions); *2000 Plum Book* 76-77 (showing that the General Counsel was in a different work unit than the Under Secretary).

[8] Memorandum from William J. Clinton for Robert S. LaRussa (May 11, 2000) (designation and prior position); *Nominations of Richard Court Houseworth, Nuria I. Fernandez, Marjory E. Searing, and Robert S. LaRussa: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 106th Cong., 2d Sess. 67-68 (2000)

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Julie E. Samuels[9]	Director, National Institute of Justice, Department of Justice	5/16/00	12/15/00	Director for Policy, Criminal Division, Department of Justice	
Richard A. Boucher[10]	Assistant Secretary of State (Public Affairs)	6/14/00	6/13/00	Spokesman of the Department of State	12/15/00

(prior positions); DOO 40-1, § 4 (June 26, 2000) on file with the Office of the Solicitor General (indicating that the Deputy Under Secretary for International Trade was the first assistant).

[9] Memorandum from William J. Clinton for Julie E. Samuels (May 16, 2000) (designation and prior position); Press Release, Office of the Press Secretary, The White House, *President Clinton Names Julie E. Samuels as Director of the National Institute of Justice at the Department of Justice* (Dec. 20, 2000), http://clinton6.nara.gov/2000/12/2000-12-20-samuels-named-director-of-the-nij.html (prior positions); *2000 Plum Book* 146 (indicating that none of Samuels's prior positions were within the National Institute of Justice).

[10] Memorandum from William J. Clinton for Richard A. Boucher (June 14, 2000) (designation and prior position); Dep't of State, *Biography of Richard A. Boucher* (Feb. 21, 2006), http://2001-2009.state.gov/r/pa/ei/biog/ 61773.htm (prior positions); Dep't of State, *Assistant Secretaries of State for Public Affairs*, http://2001-2009.state.gov/r/pa/ho/

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
John McLaughlin[11]	Deputy Director of Central Intelligence	6/28/00	7/13/00	Deputy Director for Central Intelligence	10/18/00

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po/12109.htm (last visited Aug. 12, 2016) (showing that the Assistant Secretary position became vacant in April 2000, and that Boucher began his service as Spokesman that same month); 1 Dep't of State, *Foreign Affairs Manual* 322.1 (1995) (on file with the Office of the Solicitor General) (indicating that the Principal Deputy Assistant Secretary and Spokesman of the Department is the first assistant).

[11] Memorandum from William J. Clinton for John A. McLaughlin (June 28, 2000) (designation and prior position); CIA, *John E. McLaughlin*, https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/directors-and-deputy-directors-of-central-intelligence/mclaughlin.html (prior positions); *CIA Organization Chart* (Dec. 2000), https://upload.wikimedia.org/wikipedia/en/f/ff/Cia_org_chart_2000_dec.png (CIA structure).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Mark J. Mazur[12]	Administrator, Energy Information Administration, Department of Energy	8/4/00	10/17/00	Director of the Office of Policy, Department of Energy	

[12] Memorandum from William J. Clinton for Mark J. Mazur (Aug. 4, 2000) (designation); *Nominations of Mark J. Mazur, Matthew S. Rutherford, and Meredith M. Broadbent: Hearing Before the Senate Comm. on Finance*, 112th Cong., 2d Sess. 63 (2012) (listing prior positions held before Mazur's designation as the Acting Administrator); *2000 Plum Book* 84-104 (structure of the Department of Energy).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Glenn A. Fine[13]	Inspector General, Department of Justice	8/10/00	5/15/2000	Director, Special Investigations and Review Unit, Office of the Inspector General, Department of Justice	12/15/00

[13] Memorandum from William J. Clinton for Glenn A. Fine (Aug. 10, 2000) (designation and prior position); Press Release, Office of the Press Secretary, The White House, *President Clinton Names Glenn A. Fine Inspector General of the Department of Justice* (May 15, 2000), http://clinton6.nara.gov/2000/05/2000-05-15-fine-named-as-inspector-general-of-the-department-of-justice.html (prior positions); Dep't of Defense, *Biography, Glenn A. Fine*, http://www.defense.gov/About-DoD/Biographies/Biography-View/Article/602703/glenn-a-fine (last visited Aug. 12, 2016) (prior positions); Dep't of Justice, *Organization Chart, Office of the Inspector General* (May 29, 1998) (on file with the Office of the Solicitor General) (showing that none of Fine's prior positions would have been the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
James A. Dorskind[14]	General Counsel, Department of Commerce	9/14/00	10/25/00	General Counsel, National Oceanic and Atmospheric Administration, Department of Commerce	
Kenneth Lee Smith[15]	Assistant Secretary of the Interior (Fish and Wildlife)	9/14/00	10/25/00	Deputy Chief of Staff (Office of the Secretary of the Interior)	

[14] Memorandum from William J. Clinton for James A. Dorskind (Sept. 14, 2000) (designation and prior position); Press Release, Office of the Press Secretary, The White House, *President Clinton Names James A. Dorskind as General Counsel at the Department of Commerce* (Dec. 21, 2000) http://clinton6.nara.gov/2000/12/2000-12-21-dorskind-named-general-counsel-at-the-department-of-commerce.html (prior positions); *2000 Plum Book* 32-33 (structure of the Office of General Counsel).

[15] Memorandum from William J. Clinton for Kenneth Lee Smith (Sept. 14, 2000) (designation and prior position); Press Release, Office of the Press Secretary, The White House, *President Clinton Names Kenneth Lee Smith to*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Linton F. Brooks[16]	Under Secretary for Nuclear Security, Department of Energy	7/9/02	2/4/03	Deputy Administrator for Defense Nuclear Nonproliferation, National Nuclear Security Administration, Department of Energy (Senate Confirmed)	5/1/03

Serve as Assistant Secretary for Fish, Wildlife, and Parks at the Department of the Interior (Dec. 21, 2000), http://clinton6.nara.gov/2000/12/2000-12-22-smith-named-assistant-secretary-for-fish-wildlife-and-parks.html (prior positions); Derek Catron, *Talk of Suit May Push State to Aid Manatees*, Orlando Sentinel, Aug. 10, 2000, at D1 (showing that the vacancy began in July 2000); *2000 Plum Book* 129, 132-133 (demonstrating that none of Smith's prior positions from before 1999 were within the Office of the Assistant Secretary (Fish and Wildlife)).

[16] Memorandum from George W. Bush for Linton F Brooks (July 9, 2002) (designation and prior position); *Nominations Before the Senate Armed Services Comm.: Hearings Before the Senate Comm. on Armed Services*, 108th

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Charles W. Grim[17]	Director, Indian Health Service, Department of Health & Human Services	8/12/02	3/27/03	Director, Oklahoma City Area Office, Indian Health Service	7/16/03

Cong., 1st Sess. 82-83 (2003) (prior positions); 50 U.S.C. 2403 (identifying the Principal Deputy Administrator for Nuclear Security as the first assistant).

[17] Memorandum from George W. Bush for Charles W. Grim (Aug. 12, 2002) (designation and prior position); The American Presidency Project, George W. Bush, *Nominations and Appointments* (Aug. 1, 2002), http://www.presidency.ucsb.edu/ws/?pid=79721 (prior positions); Dep't of Health & Human Servs., *Indian Health Serv., Organization Chart* (Feb. 12, 2002) (on file with the Office of the Solicitor General) (showing that none of Grim's prior positions would have been understood to be the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
James M. Loy[18]	Under Secretary of Transportation for Security	11/12/02	11/14/02	Deputy Under Secretary of Transportation for Security	11/18/02
R. Hewitt Pate[19]	Assistant Attorney General (Antitrust)	12/3/02	3/13/2003	Deputy Assistant Attorney General (Antitrust)	6/13/03

[18] Memorandum from George W. Bush for Admiral James M. Loy (Nov. 12, 2002) (designation and prior position); *Transportation Security Administration Gets New Chief; Secretary Mineta Emphasizes Difficulty of the Job*, Federal Information and News Dispatch, Inc., July 18, 2002 (noting that the vacancy was created in July 2002); U.S. Coast Guard, U.S. Dep't of Homeland Sec., *James M. Loy, 1998-2002* (Jan. 12, 2016), http://www.uscg.mil/history/CCG/Loy/jmloy_bio.asp (indicating that Loy had been in a different position—Commandant of the Coast Guard—through the end of May 2002).

[19] Memorandum from George W. Bush for R. Hewitt Pate (Dec. 3, 2002) (designation and prior position); *Confirmation Hearing on the Nomination of R. Hewitt Pate to be Assistant Attorney General, Antitrust Division, Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong., 1st Sess. 8 (2003) (prior position); 28 C.F.R. 0.132 (2002) (explaining how to identify the first assistant at the Department of Justice); Curt

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Robert D. McCallum, Jr.[20]	Associate Attorney General	3/28/03	4/2/2003	Assistant Attorney General (Civil) (Senate Confirmed)	6/27/03

Anderson, *Justice Department Welcomes Judges' Decision in Microsoft Case*, Associated Press, Nov. 1, 2002 (noting that a different individual was the top deputy in the Antitrust Division).

[20] Memorandum from George W. Bush for Robert D. McCallum, Jr. (Mar. 28, 2003) (designation and prior position); *Confirmation Hearing on Nominations of Robert D. McCallum, Jr. to be Associate Attorney General and Peter D. Keisler to be Assistant Attorney General, Civil Division: Hearing Before the Senate Comm. on the* Judiciary, 108th Cong., 1st Sess. 8 (2003) (prior position); 28 C.F.R. 0.137(b) (2003) (explaining that the "Principal Deputy" to a position is the first assistant); *Two Men Appointed to Serve Under the Attorney General*, State News Service, May 23, 2002 (showing that another individual served as the Principal Deputy Associate Attorney General).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Daniel J. Bryant[21]	Assistant Attorney General (Legal Policy)	6/3/03	7/8/03	Counsel and Senior Advisor to the Attorney General	10/3/03
Christopher A. Wray[22]	Assistant Attorney General (Criminal)	6/17/03	6/9/03	Principal Associate Deputy Attorney General	9/11/03

[21] Memorandum from George W. Bush for Daniel J. Bryant (June 3, 2003) (designation and prior position); *Confirmation Hearing on the Nominations of Daniel J. Bryant to be Assistant Attorney General, Office of Legal Policy, Department of Justice and Rene Alexander Acosta to be Assistant Attorney General, Civil Rights Division, Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong., 1st Sess. 11 (2003) (prior positions, including as the Senate-Confirmed Assistant Attorney General (Legislative Affairs)); 28 C.F.R. 0.137(b) (2003) (explaining that the "Principal Deputy" to a position is the first assistant); Dep't of Justice, *Organization Chart, Office of Legal Policy* (July 1, 2002) (on file with the Office of the Solicitor General) (showing the existence of a Principal Deputy position).

[22] Memorandum from George W. Bush for Christopher A. Wray (June 16, 2003) (designation, effective date of June 17, 2003, and prior position); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Stephen L. Johnson[21]	Deputy Administrator, Environmental Protection Agency	7/11/03	1/21/04	Assistant Administrator (Prevention, Pesticides, Toxic Substances), Environmental Protection Agency (Senate Confirmed)	11/21/04

Comm. on the Judiciary, 108th Cong., 1st Sess., Pt. 3, at 849 (2003) (prior positions); House Comm. on Government Reform, 108th Cong., 2d Sess., *Policy & Supporting Positions* 94-96 (Comm. Print 2004) (*2004 Plum Book*) (showing that none of Wray's prior positions were within the Criminal Division).

[21] Memorandum from George W. Bush for Stephen L. Johnson (July 11, 2003) (designation and prior position). The Environmental Protection Agency informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Eugene Hickok[24]	Deputy Secretary of Education	7/24/03	1/28/04	Under Secretary of Education (Senate Confirmed)	11/21/04
Michele M. Leonhart[25]	Deputy Administrator, Drug Enforcement Administration, Department of Justice	9/6/03	10/3/03	Special Agent in Charge of the L.A. Field Office, Drug Enforcement Administration, Department of Justice	3/8/04

[24] Memorandum from George W. Bush for Eugene Hickok (July 24, 2003) (designation and prior position); George W. Bush, The American Presidency Project, *Personnel Announcement* (*Personnel Announcement)* (Oct. 31, 2003), http://www.presidency.ucsb.edu/ws/?pid=79929 (prior position). The Department of Education informs this Office that at the relevant time, this position had no first assistant.

[25] Memorandum from George W. Bush for Michele M. Leonhart (Sept. 6, 2003) (designation and prior position); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 111th Cong., 2d Sess., Pt. 8, at 556-557 (2010) (prior positions); Dep't of Justice, *Organization Chart, Drug Enforcement*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Susan K. Sclafani[26]	Assistant Secretary of Education (Vocational and Adult Education)	9/6/03	10/29/03	Counselor to the Secretary of Education	1/26/04
Brian Carlton Roseboro[27]	Under Secretary of the Treasury (Domestic Finance)	10/7/03	12/9/03	Assistant Secretary of the Treasury (Financial Markets) (Senate Confirmed)	4/8/04

Administration (May 23, 1995) (on file with the Office of the Solicitor General) (showing that none of Leonhart's prior positions could the first assistant).

[26] Memorandum from George W. Bush for Susan K. Sclafani (Sept. 6, 2003) (designation and prior position); *Personnel Announcement* (Sept. 3, 2003), http://www.presidency.ucsb.edu/ws/?pid=80573 (prior positions); *2000 Plum Book* 75, 83 (showing that a position in the Office of the Secretary would not have been in the Office of Vocational and Adult Education).

[27] Memorandum from George W. Bush for Brian Carlton Roseboro (Oct. 6, 2003) (designation, effective date of Oct. 7, 2003, and prior position); *Nominations of Dr. Mark B. McClellan, Brian Roseboro, Donald Korb, and Mark Warshawsky: Hearing Before the Senate Comm. on Finance*, 108th Cong., 2d Sess. 210 (2004) (prior positions); Lawrence H. Summers, Sec'y of the Treasury, *Designation of First Assistants to Offices in the Department* (Jan.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
James B. Comey[28]	Deputy Attorney General	11/19/03	10/17/03	U.S. Attorney (S.D.N.Y.) (Senate Confirmed)	12/9/03
Kirk Van Tine[29]	Deputy Secretary of Transportation	12/10/03	1/26/04	Counselor to the Secretary of Transportation	

12, 2001) (on file with the Office of the Solicitor General) (designating the Fiscal Assistant Secretary as first assistant).

[28] Memorandum from George W. Bush for James B. Comey (Nov. 19, 2003) (designation and prior position); *Confirmation Hearing on the Nomination of James B. Comey, Jr., of New York, to be Deputy Attorney General, Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 108 Cong., 1st Sess. 7-8 (2003) (prior positions); 28 C.F.R. 0.137(b) (2003) (explaining that the "Principal Deputy" to a position is the first assistant); *2004 Plum Book* 94 (showing that there was a "Principal Associate Deputy Attorney General" position).

[29] Memorandum from George W. Bush for Kirk Van Tine (Dec. 10, 2003) (designation and prior position). The Department of Transportation informs this Office that the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Gordon H. Mansfield[30]	Deputy Secretary of Veterans Affairs	12/19/03	11/3/03	Assistant Secretary of Veterans Affairs for Congressional Affairs (Senate Confirmed)	1/22/04
Arden Bement[31]	Director, National Science Foundation	2/23/04	9/15/04	Director, National Institute for Standards and Technology, Department of Commerce (Senate Confirmed)	11/21/04

[30] Memorandum from George W. Bush for Gordon H. Mansfield (Dec. 19, 2003) (designation and prior position); 159 Cong. Rec. S649 (daily ed. Feb. 12, 2013) (statement of Sen. Burr) (prior position). The Department of Veterans Affairs informs this Office that at the relevant time, this position had no first assistant.

[31] Memorandum from George W. Bush for Arden Bement, Jr. (Feb. 23, 2004) (designation and prior position); Nat'l Science Found., *Biography, Dr. Arden L. Bement, Jr.*, http://www.nsf.gov/news/speeches/bement/bement_bio.jsp (last visited Aug. 12, 2016) (prior positions, none of which were at the National Science Foundation).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Patrick P. O'Carroll[32]	Inspector General, Social Security Administration	3/10/04	4/8/04	Assistant Inspector General for Investigations, Social Security Administration	11/21/04

[32] Memorandum from George W. Bush for Patrick P O'Carroll, Jr. (Mar. 10, 2004) (designation); *Nominations of J. Russell George, Patrick P. O'Carroll, Jr., Timothy Bitsberger, and Paul Jones: Hearing Before the Senate Comm. on Finance*, 108th Cong., 2d Sess. 87, 90 (2004) (prior positions); Office of the Inspector Gen., Soc. Sec'y Admin., *Semiannual Report to Congress* 89 (Apr. 1, 2003-Sept. 30, 2003) (organization chart).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Thomas V. Skinner[33]	Assistant Administrator (Enforcement and Compliance Assurance), Environmental Protection Agency	4/1/04	9/8/04	Region 5 Administrator, Environmental Protection Agency	

[33] Memorandum from George W. Bush for Thomas V. Skinner (Apr. 1, 2004) (designation and prior position); News Release, EPA, *Thomas V. Skinner Named as Acting Assistant Administrator for the Office of Enforcement*, (Apr. 5, 2004), https://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/03ffc5d37a59d3f385256e6d0050c93f (past positions); *2004 Plum Book* 161 (showing the existence of a principal deputy position).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
David Garman[34]	Under Secretary of Energy	4/19/04	3/4/05	Assistant Secretary of Energy (Efficiency and Renewable Energy) (Senate Confirmed)	6/15/05
John S. Shaw[35]	Assistant Secretary of Energy (Environment, Safety and Health)	7/26/04	7/22/04	Deputy Chief of Staff and White House Liaison, Department of Energy	12/8/04

[34] Memorandum from George W. Bush for David Garman (Apr. 19, 2004) (designation and prior position); Dep't of Energy, *David K. Garman Sworn in as Under Secretary of Energy* (June 23, 2005), http://energy.gov/articles/david-k-garman-sworn-under-secretary-energy (prior position). The Department of Energy informs this Office that at the relevant time, this position had no first assistant.

[35] Memorandum from George W. Bush for John S. Shaw (July 26, 2004) (designation and prior position); *Harbert and Shaw Nominations: Hearing Before the Senate Comm. on Energy and Natural Resources*, 108th Cong., 2d Sess. 7 (2004) (prior positions); EHS Today, *Two Top Energy Department Officials Resign* (Apr. 5, 2004),

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Daniel R. Levinson[36]	Inspector General, Department of Health & Human Services	9/8/04	1/24/05	Inspector General, General Services Administration (Senate Confirmed)	6/8/05

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ehstoday.com/news/ehs_imp_36929 (showing that the position became vacant on April 16, 2004); Al Kamen, *Jaws and Paws*, Washington Post, Feb. 14, 2003, at A29 (explaining that although Shaw had once been the Principal Deputy Assistant Secretary for Environment, Safety, and Health, he left that position in February 2003).

[36] Memorandum from George W. Bush for Daniel R. Levinson (Sept. 8, 2004) (designation and prior position); *Nominations of Daniel R. Levinson, Harold Damelin, and Raymond T. Wagner, Jr.: Hearing Before the Senate Comm. on* Finance, 109th Cong., 1st Sess. 29 (2005) (showing that Levinson had been at another agency since at least 2001); Christopher Marquis, *A Top Health Official Resigns Under Pressure*, N.Y. Times, Mar. 5, 2003, at A19 (vacancy creation date).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Raymond Simon[37]	Deputy Secretary of Education	4/18/05	4/15/05	Assistant Secretary of Education (Elementary and Secondary Education) (Senate Confirmed)	5/26/05
Alex M. Azar II[38]	Deputy Secretary of Health and Human Services	4/20/05	4/19/05	General Counsel, Department of Health and Human Services (Senate Confirmed)	7/22/05

[37] Memorandum from George W. Bush for Raymond Simon (Apr. 18, 2005) (designation and prior position). The Department of Education informs this Office that at the relevant time, this position had no first assistant.

[38] Memorandum from George W. Bush for Alex Azar II (Apr. 20, 2005) (designation and prior position); *Nominations of Alex Azar II, Timothy D. Adams, Suzanne C. DeFrancis, Charles E. Johnson, and Shara L. Aranoff: Hearing Before the Senate Comm. on Finance*, 109th Cong., 1st Sess. 63 (2005) (prior position). The Department of Health and Human Services informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
David A. Sampson[39]	Deputy Secretary of Commerce	5/2/05	4/4/05	Assistant Secretary of Commerce (Economic Development) (Senate Confirmed)	7/22/05
Gordon England[40]	Deputy Secretary of Defense	5/13/05	4/7/05	Secretary of the Navy (Senate Confirmed)	4/6/06

[39] Memorandum from George W. Bush for David A. Sampson (May 2, 2005) (designation and prior position); *Nominations of David A. Sampson, to be Deputy Secretary, and John J. Sullivan, to be General Counsel of the Department of Commerce: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 109th Cong., 1st Sess. 6 (2005) (prior position). The Department of Commerce informs this Office that at the relevant time, this position had no first assistant.

[40] Memorandum from George W. Bush for Gordon England (May 13, 2005) (designation and prior position); *Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services*, 109th Cong., 1st Sess. 181 (2005) (prior position). The Department of Defense informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
James Lambright[41]	President of the Export Import Bank	7/21/05	2/13/06	Executive Vice President of the Export-Import Bank	7/26/06
John F. Clark[42]	Director, Marshals Service, Department of Justice	7/29/05	10/21/05	U.S. Marshal (E.D. Va.) (Senate Confirmed)	3/16/06

[41] Memorandum from George W. Bush for James Lambright (July 14, 2005) (designation, effective date of July 21, 2005, and prior position); *Nominations of: James Lambright, Armando J. Bucelo, Jr., Todd S. Farha, John T. Rymer, John W. Cox, and William Hardiman: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 109th Cong., 2d Sess. 33 (2006) (prior positions); 12 U.S.C. 635a(b) (making the First Vice President the first assistant).

[42] Memorandum from George W Bush for John F. Clark (July 29, 2005) (designation and prior position); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. Pt. 3, at 247-248 (2006) (prior positions); Dep't of Justice, *Organization Chart, United States Marshals*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
R. David Paulison[43]	Under Secretary of Homeland Security (Emergency Preparedness and Response)	9/12/05	4/6/06	Administrator, Fire Administration, Department of Homeland Security (Senate Confirmed)	5/26/06

Service (Oct. 27, 2004) (on file with the Office of the Solicitor General) (showing that none of Clark's prior positions could have been understood as the first assistant).

[43] Memorandum from George W. Bush for R. David Paulison (Sept. 12, 2005) (designation and prior position); *Nomination of R. David Paulison: Hearing Before the Senate Comm. on Homeland Security and Governmental Affairs*, 109th Cong., 2d Sess. 1, 49 (2006) (listing prior positions, and noting that this position serves as the "Director of FEMA"); 44 C.F.R. 2.11 (2005) (explaining that the FEMA Deputy Director is the first assistant to FEMA's Director).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Santanu K. Baruah[44]	Assistant Secretary of Commerce (Economic Development)	9/15/05	9/6/05	Deputy Assistant Secretary of Commerce for Program Operations and Chief of Staff	12/17/05

[44] Memorandum from George W. Bush for Santanu K. Baruah (Sept. 15, 2005) (designation); *Nominations of Santanu K. Baruah; George M. Gray; Lyons Gray; H. Dale Hall; and Edward McGaffigan, Jr.: Hearing Before the Senate Comm. on Environment and Public Works*, 109th Cong., 1st Sess. 16, 33 (2005) (prior positions); DOO 10-4, § 3.03 (issuance date Apr. 15, 2004) (on file with the Office of the Solicitor General) (indicating that the Deputy Assistant Secretary for Economic Development was the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Andrew von Eschenbach[45]	Commissioner, Food and Drug Administration, Department of Health and Human Services	9/23/05	3/15/06	Director, National Cancer Institute, Department of Health and Human Services	12/7/06
Paul J. McNulty[46]	Deputy Attorney General	11/1/05	11/9/05	U.S. Attorney (E.D. Va.) (Senate Confirmed)	3/16/06

[45] Memorandum from George W. Bush for Andrew von Eschenbach (Sept. 23, 2005) (designation and prior position); FDA, Dep't of Health & Human Servs., *Biography of Andrew C. von Eschenbach, M.D.* (Feb. 20, 2009), http://www.fda.gov/AboutFDA/WhatWeDo/History/Leaders/Commissioners/ucm093711.htm (prior positions); Memorandum from the Acting Commissioner of Food and Drugs 1 (Nov. 10, 2004) (designating the Deputy Commissioner as the first assistant).

[46] Memorandum from George W. Bush for Paul J. McNulty (Nov. 1, 2005) (designation and prior position); *Confirmation Hearing on the Nomination of Paul J. McNulty, of Virginia, to be Deputy Attorney General, Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 11 (2006) (prior positions, including that McNulty had not served as Principal Associate Deputy Attorney General since 2001); Eric

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Sharee M. Freeman[47]	Director, Community Relations Service, Department of Justice	12/20/05	12/20/05	Counselor to the Assistant Attorney General, Civil Rights Division	3/31/06

Lichtblau, *President Picks 2nd Nominee for Justice Post*, N.Y. Times, Oct. 22, 2005, at A15 (indicating that the Deputy Attorney General position became vacant in August 2005); 28 C.F.R. 0.137(b) (2005) (explaining that the "Principal Deputy" to a position is the first assistant).

[47] Memorandum from George W. Bush for Sharee M. Freeman (Dec. 20, 2005) (designation and prior position); *Personnel Announcement* (Dec. 19, 2005), http://www.presidency.ucsb.edu/ws/?pid=82312 (prior positions); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess., Pt. 3, at 527 (2006) (prior positions, including four years of service as the Director of the Community Relations Service, which ended approximately a month before she was renominated and designated as acting).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
William Ludwig Wehrum, Jr.[46]	Assistant Administrator (Air and Radiation), Environmental Protection Agency	3/2/06	2/27/06	Principal Deputy Assistant Administrator, Office of Air and Radiation, Environmental Protection Agency	

[46] Memorandum from George W. Bush for William Ludwig Wehrum, Jr. (Mar. 2, 2006) (designation and prior position); *Nominations of Richard Capka, James B. Gulliford and William L. Wehrum: Hearing Before the Senate Comm. on Environment and Public Works*, 109th Cong., 2d Sess. 142 (2006) (prior positions, including that he was not named as the Principal Deputy Assistant Administrator until August 2005); *Wehrum to Run EPA Air Office*, Inside Energy with Federal Lands (Aug. 1, 2005) (explaining that the vacancy did not arise until August 2005).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Thomas E. Harvey[49]	Assistant Secretary of Veterans Affairs (Congressional Affairs)	3/20/06	6/26/06	Senior Advisor to the Secretary of Veterans Affairs	5/25/07

[49] Memorandum from George W. Bush for Thomas E. Harvey (Mar. 20, 2006) (designation and prior position); *Nominations of Thomas E. Harvey to be Assistant Secretary for Congressional and Legislative Affairs, Department of Veterans Affairs; and Patrick W. Dunne to be Assistant Secretary for Policy and Planning, Department of Veterans Affairs: Hearing Before the Senate Comm. on Veterans' Affairs*, 109th Cong., 2d Sess. 9-10 (2006) (prior positions); *2004 Plum Book* 144, 146 (showing that none of Harvey's prior positions were within the Office of the Assistant Secretary for Congressional and Legislative Affairs).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
James B. Lockhart III[50]	Director, Office of Federal Housing Enterprise Oversight, Department of Housing and Urban Development	4/28/06	4/27/06	Deputy Commissioner of Social Security (Senate Confirmed)	6/15/06

[50] Memorandum from George W. Bush for James B. Lockhart III (Apr. 28, 2006) (designation and prior position); *Nominations of Shelia Bair, James B. Lockhart, III, Donald L. Kohn, and Kathleen L. Casey: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 109th Cong., 2d Sess. 35 (2006) (prior positions, none of which were within the Department of Housing and Urban Development).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Michael J. Sullivan[51]	Director, Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice	8/31/06	3/22/07	U.S. Attorney (D. Mass.) (Senate Confirmed)	

[51] Memorandum from George W. Bush for Michael J. Sullivan (Aug. 31, 2006) (designation and prior position); Ashcroft Law Firm, *Michael Sullivan*, http://ashcroftlawfirm.com/professionals/michael-sullivan/ (last visited Aug. 12, 2016) (prior positions); Dep't of Justice, *Organization Chart, Bureau of Alcohol, Tobacco, Firearms and Explosives* (Oct. 17, 2005) (on file with the Office of the Solicitor General) (showing that a U.S. Attorney would not have been the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
William W. Mercer[52]	Associate Attorney General	9/6/06	9/5/06	U.S. Attorney (D. Mont.) (Senate Confirmed)	

[52] Memorandum from George W. Bush for William W. Mercer (Sept. 6, 2006) (designation and prior position); Holland & Hart, LLP *William W. Mercer*, https://www.hollandhart.com/wwmercer (last visited Aug. 12, 2016) (prior positions); 28 C.F.R. 0.137(b) (2006) (explaining that the "Principal Deputy" to a position is the first assistant); Robert Boczkiewicz, *Bush Names Choice for 10th Circuit Court of Appeals*, Salt Lake Tribune, May 11, 2006 (demonstrating that another individual filled the principal deputy role).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Paul J. Hutter[53]	General Counsel, Department of Veterans Affairs	9/21/06	6/28/07	Assistant General Counsel, Department of Veterans Affairs	10/4/07

[53] Memorandum from George W. Bush for Paul J. Hutter (Sept. 21, 2006) (designation and prior position); *Personnel Announcement* (Sept. 21, 2006), http://www.presidency.ucsb.edu/ws/?pid=82722 (prior positions); *2004 Plum Book* 144 (showing that the position of Deputy General Counsel was between the General Counsel and the Assistant General Counsels).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Robert M. Couch[54]	General Counsel, Department of Housing and Urban Development	12/5/06	4/10/07	President, Government National Mortgage Association (Senate Confirmed)	6/13/07

[54] Memorandum from George W. Bush for Robert M. Couch (Dec. 5, 2006) (designation and prior position); *Personnel Announcement* (Apr. 4, 2007), http://www.presidency.ucsb.edu/ws/?pid=83548 (prior positions, none of which were within the Department of Housing and Urban Development).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Thomas P. D'Agostino[55]	Under Secretary for Nuclear Security, Department of Energy	1/20/07	5/21/07	Deputy Director (Defense Programs), National Nuclear Security Administration, Department of Energy (Senate Confirmed)	8/1/07

[55] Memorandum from George W. Bush for Thomas P D'Agostino (Jan. 17, 2007) (designation, effective date of Jan. 20, 2007, and prior position); *Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services*, 110th Cong., 1st Sess. 699 (2007) (prior positions); 50 U.S.C. 2403 (identifying the Principal Deputy Administrator for Nuclear Security as the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Howard Radzely[56]	Deputy Secretary of Labor	1/23/07	5/10/07	Solicitor of Labor (Senate Confirmed)	12/19/07

[56] Memorandum from George W. Bush for Howard Radzely (Jan. 23, 2007) (designation and prior position); *Nomination of Gregory Jacob and Howard Radzely: Hearing of the Senate Comm. on Health, Education, Labor, and Pensions*, 110th Cong., 1st Sess. 6 (2007) (prior position). The Department of Labor informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Thomas J. Barrett[57]	Deputy Secretary of Transportation	2/22/07	6/11/07	Administrator, Pipeline and Hazardous Materials Safety Administration, Department of Transportation (Senate Confirmed)	8/3/07

[57] Memorandum from George W. Bush for Thomas J. Barrett (Feb. 22, 2007) (designation and prior position); *Nominations to the Department of Transportation, the National Aeronautics and Space Administration, and the Department of Commerce: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 110th Cong., 1st Sess. 16-18 (2007) (prior positions). The Department of Transportation informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Kerri Layne Briggs[58]	Assistant Secretary of Education (Elementary and Secondary Education)	3/7/07	3/7/07	Deputy Assistant Secretary of Education, (Planning, Evaluation, and Policy Development)	6/22/07

[58] Memorandum from George W. Bush for Kerri Layne Briggs (Mar. 7, 2007) (designation and prior position); *Personnel Announcement* (Mar. 6, 2007), http://www.presidency.ucsb.edu/ws/?pid=83630 (prior positions); Senate Comm. on Homeland Security and Governmental Affairs, 110th Cong., 2d Sess., *Policy & Supporting Positions* 48-49, 51-52 (Comm. Print 2008) (*2008 Plum Book*) (showing positions within the Office of Elementary and Secondary Education).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Henrietta Holsman Fore[59]	Administrator, United States Agency for International Development	5/7/07	5/24/07	Under Secretary of State (Management) (Senate Confirmed)	11/13/07

[59] Memorandum from George W. Bush for Henrietta Holsman Fore (May 7, 2007) (designation and prior position); *Nominations of the 110th Congress: Hearings Before the Senate Comm. on Foreign Relations*, 110th Cong., 1st Sess. 559 (2007) (prior positions since 2001, none of which had been in the United States Agency for International Development); Glenn Kessler, *Rice Deputy Quits After Query Over Escort Service*, Washington Post (Apr. 28, 2007), at A1 (vacancy creation date).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Ondray T. Harris[60]	Director, Community Relations Service, Department of Justice	5/23/07	5/23/07	Deputy Chief, Employment Litigation Section, Civil Rights Division, Department of Justice	3/13/08
Ronald Jay Tenpas[61]	Assistant Attorney General (Environment and Natural Resources)	5/30/07	6/4/07	Associate Deputy Attorney General	12/13/07

[60] Memorandum from George W. Bush for Ondray T. Harris (May 23, 2007) (designation and prior position); *Personnel Announcement* (May 22, 2007), http://www.presidency.ucsb.edu/ws/?pid=83509 (prior positions); Dep't of Justice, *Organization Chart, Community Relations Service* (Apr. 29, 2005) (on file with the Office of the Solicitor General) (demonstrating that an individual from the Civil Rights Division would not have been the first assistant).

[61] Memorandum from George W. Bush for Ronald J. Tenpas (May 30, 2007) (designation and prior position); *Personnel Announcement* (May 30, 2007), http://www.presidency.ucsb.edu/ws/?pid=83531 (prior positions); *2008 Plum*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Craig W. Duehring[62]	Assistant Secretary of the Air Force (Manpower and Reserve Affairs)	6/29/07	11/15/07	Principal Deputy Assistant Secretary of Defense (Reserve Affairs)	12/19/07

Book 95-100 (demonstrating that none of Tenpas's prior positions were within the Environment and Natural Resources Division).

[62] Memorandum from George W. Bush for Craig W. Duehring (June 29, 2007) (designation and prior position); *Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services*, 110th Cong., 1st Sess. 1277 (2007) (prior position, which was in the Office of the Assistant Secretary of Defense for Reserve Affairs, and not in any office of the Air Force).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Kerry N. Weems[63]	Administrator, Centers for Medicare and Medicaid Services, Department of Health and Human Services	9/4/07	5/3/07	Senior Advisor to the Administrator, Centers for Medicare and Medicaid Services, Department of Health and Human Services	

[63] Memorandum from George W. Bush for Kerry N. Weems (Sept. 4, 2007) (designation and prior position); *Nominations of Dr. Tevi Troy, David H. McCormick, Peter B. McCarthy, Kerry N. Weems, and Charles E.F Millard: Hearing Before the Senate Comm. on Finance* 110th Cong., 1st Sess. 136-137 (2007) (prior positions as of May 2007); Christopher Lee, *and a Departure*, Washington Post, Sept. 6, 2006, at A13 (vacancy created in October 2006); 2008 *Plum Book* 65, 66, 70-72 (demonstrating that none of Weems's prior positions held before October 2006 were within the Centers for Medicare and Medicaid Services).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Christopher A. Padilla[64]	Under Secretary of Commerce (International Trade)	9/26/07	9/4/07	Assistant Secretary of Commerce (Export Administration) (Senate Confirmed)	12/19/07
Grace C. Becker[65]	Assistant Attorney General (Civil Rights)	12/3/07	11/15/07	Deputy Assistant Attorney General (Civil Rights)	

[64] Memorandum from George W. Bush for Christopher A. Padilla (Sept. 26, 2007) (designation and prior position); *Nominations of Christopher Padilla, Christina Pearson, and Benjamin Sasse: Senate Hearing Before the Comm. on Finance*, 110th Cong., 1st Sess. 22 (2007) (prior positions); DOO 40-1, §4 (issuance date Aug. 2, 2004) (on file with the Office of the Solicitor General) (indicating that the Deputy Under Secretary for International Trade was the first assistant).

[65] Memorandum from George W. Bush for Grace C. Becker (Dec. 3, 2007) (designation and prior position); *Confirmation Hearing on the Nomination of Grace C. Becker to be Assistant Attorney General for the Civil Rights Division: Hearing Before the Comm. on the Judiciary*, 110th Cong., 2d Sess. 7-8 (2008) (prior positions); 28 C.F.R. 0.137(b) (2007) (explaining that the "principal deputy" position is the first assistant); United States Government

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Nelson M. Ford[66]	Under Secretary of the Army	12/3/07	1/22/08	Assistant Secretary of the Army (Financial Management and Comptroller) (Senate Confirmed)	7/23/08

Printing Office, *Official Congressional Directory, 110th Congress* 642 (2007-2008) (demonstrating that the principal deputy position existed in the Civil Rights Division, and was filled by another individual).

[66] Memorandum from George W. Bush for Nelson M. Ford (Dec. 3, 2007) (designation and prior position); *Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services*, 110th Cong., 2d Sess. 281, 385 (2008) (prior position). The Department of Defense informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
John C. Rood[67]	Under Secretary of State (Arms Control and International Security)	9/26/07	3/22/07	Assistant Secretary of State (International Security and Nonproliferation) (Senate Confirmed)	
Jeffrey Leigh Sedgwick[68]	Assistant Attorney General (Justice Programs)	1/3/08	4/23/08	Director, Bureau of Justice Statistics, Department of Justice (Senate Confirmed)	10/2/08

[67] Memorandum from George W Bush for John C. Rood (Sept. 26, 2007) (designation and prior position); Office of the Historian, Dep't of State, John C. Rood (1968-) (Sept. 26, 2007), https://history.state.gov/departmenthistory/people/rood-john-c (prior position). The State Department informs this Office that at the relevant time, this position had no first assistant.

[68] Memorandum from George W. Bush for Jeffrey Leigh Sedgwick (Jan. 3, 2008) (designation and prior position); *Executive Nominations: J. Patrick Rowan, of Maryland, Nominee to be an Assistant Attorney General, National Security Division; Jeffrey Leigh Sedgwick, Nominee to be Assistant Attorney General, Office of Justice Pro-*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Richard Stickler[66]	Assistant Secretary of Labor (Mine Safety and Health)	1/4/08	1/9/07	Deputy Assistant Secretary of Labor	

grams; and William B. Carr, Jr., Nominee to be Member of the U.S. Sentencing Commission: Hearing Before the Senate Comm. on the Judiciary, 110th Cong., 2d Sess. 39 (2008) (prior position); 28 C.F.R. 0.137(b) (2008) (allowing the Attorney General to designate a first assistant when there is no principal deputy); Department of Justice, Order No. 2793-2005 (Dec. 28. 2005) (on file with the Office of the Solicitor General) (designating another individual as first assistant).

[66] Memorandum from George W. Bush for Richard Stickler (Jan. 4, 2008) (designation and prior position); U.S. Dep't of Labor, *About Acting Assistant Secretary for Mine Safety and Health Richard E. Stickler*, https://www.dol.gov/msha/stickler.htm (last visited Aug. 12, 2016) (noting that Stickler's prior service as the Assistant Secretary ended on December 31, 2007, which was when the vacancy was created).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Jeffrey F. Kupfer[70]	Deputy Secretary of Energy	3/3/08	4/2/08	Chief of Staff, Department of Energy	
Patrick W. Dunne[71]	Under Secretary of Veterans Affairs for Benefits	4/2/08	7/30/08	Assistant Secretary of Veterans Affairs for Policy and Planning (Senate Confirmed)	10/2/08

[70] Memorandum from George W. Bush for Jeffrey P. Kupfer (Mar. 3, 2008) (designation and prior position); *Kupfer and Onley Nominations: Hearing Before the Senate Comm. on Energy and Natural Resources*, 110th Cong., 2d Sess. 1, 4-5 (2008) (prior position). The Department of Energy informs this Office that at the relevant time, this position had no first assistant.

[71] Memorandum from George W. Bush for Patrick W. Dunne (Apr. 2, 2008) (designation and prior position); *Nominations of the 110th Congress: Hearing Before the Senate Comm. on Veterans' Affairs*, 110th Cong., 2d Sess. 93-94 (2008) (prior position); *2008 Plum Book* 133-134, 135 (showing that Dunne's prior position was not within the Veterans Benefits Administration).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Kameran L. Onley[72]	Assistant Secretary of the Interior (Water and Science)	4/14/08	3/31/08	Assistant Deputy Secretary of the Interior	

[72] Memorandum from George W. Bush for Kameran L. Onley (Apr. 14, 2008) (designation and prior position); *Kupfer and Onley Nominations: Hearing Before the Senate Comm. on Energy and Natural Resources*, 110th Cong., 2d Sess. 1 (2008) (prior position). The first assistant, if anyone, would have been the Deputy Assistant Secretary. See Memorandum from Mark Limbaugh to Gale Norton (Dec. 28, 2005) (on file with the Office of the Solicitor General) (designating the Deputy Assistant Secretary as the first assistant); Sec'y of the Interior, Order No. 3272 (July 13, 2007) (on file with the Office of the Solicitor General) (modifying the 2005 memorandum to indicate that no individual mentioned in that memorandum is a "first assistant," delegating various authorities to the Assistant Deputy Secretary other than those required by statute or regulation to be performed exclusively by the Assistant Secretary, and indicating that the order expires upon the designation of an Acting Assistant Secretary under the FVRA).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
David Reid Murtaugh[73]	Deputy Director for State, Local and Tribal Affairs, Office of National Drug Control Policy	4/28/08	7/15/08	U.S. Marshal (N.D. Ind.) (Senate Confirmed)	
Gregory G. Katsas[74]	Assistant Attorney General (Civil Division)	5/2/08	12/11/07	Principal Deputy Associate Attorney General	6/27/08

[73] Memorandum from George W. Bush for David Reid Murtaugh (Apr. 28, 2008) (designation and prior position); *Personnel Announcement* (July 15, 2008), http://www.presidency.ucsb.edu/ws/?pid=84067 (prior positions, none of which were within the Executive Office of the President).

[74] Memorandum from George W. Bush for Gregory G. Katsas (May 2, 2008) (designation and prior position); *Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary*, 110th Cong., 2d Sess., Pt. 3, at 60 (2008) (prior positions); 28 C.F.R. 0.137(b) (2008) (indicating that the "Principal Deputy" is the first assistant); Dep't of Justice, *Organization Chart, Civil Division* (Aug. 5, 2004) (on file with the Office of the Solicitor General) (showing the existence of a principal deputy position within the Civil Division).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Jason J. Fichtner[75]	Deputy Commissioner of Social Security	5/22/08	6/25/08	Associate Commissioner of Social Security (Retirement Policy)	
Matthew W. Friedrich[76]	Assistant Attorney General (Criminal)	5/22/08	12/11/08	Deputy Chief of Staff, Office of the Attorney General	

[75] Memorandum from George W. Bush for Jason J. Fichtner (undated) (designation and prior position); *Personnel Announcement* (May 22, 2008), http://www.presidency.ucsb.edu/ws/?pid=83958 (designation); *Personnel Announcement* (June 25, 2008), http://www.presidency.ucsb.edu/ws/?pid=84022 (prior position). The designation date listed is the date on which President Bush announced his intent to designate the official. The letter of designation itself is undated. The Social Security Administration informs this Office that in the relevant period, this position had no first assistant.

[76] Memorandum from George W. Bush for Matthew W. Friedrich (May 22, 2008) (designation and prior position); *Personnel Announcement* (Dec. 10, 2008), http://www.presidency.ucsb.edu/ws/?pid=85314 (prior positions); Press Release, Dep't of Justice, *Assistant Attorney General for the Criminal Division Alice S. Fisher to Leave Department of Justice*, Apr. 30, 2008, https://www.justice.gov/archive/opa/pr/2008/April/08-opa-359.html (showing that the

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Michael Bruce Donley[77]	Secretary of the Air Force	6/21/08	6/25/08	Director of Administration and Management, Office of the Secretary of Defense	10/2/08
Brian H. Hook[78]	Assistant Secretary of State (International Organization Affairs)	7/2/08	6/27/08	Deputy Assistant Secretary of State (International Organization Affairs)	10/2/08

vacancy arose as of May 23, 2008); Marisa Taylor, *Justice's Criminal Division Gets a New Chief*, McClatchy DC, May 22, 2008, http://www.mcclatchydc.com/news/politics-government/article24484459.html (showing that Friedrich had left the Criminal Division by May 2007).

[77] Memorandum from George W. Bush for Michael Bruce Donley (June 20, 2008) (designation, effective date of June 21, 2008, and prior position); *Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services*, 110th Cong., 2d Sess. 416 (2008) (prior positions); Exec. Order No. 12,909, 59 Fed. Reg. 21,909 (Apr. 22, 1994) (identifying the Under Secretary of the Air Force as the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Gordon S. Heddell[79]	Inspector General, Department of Defense	7/14/08	6/1/09	Inspector General, Department of Labor (Senate Confirmed)	7/10/09
James A. Slutz[80]	Assistant Secretary of Energy (Fossil Energy)	7/30/08	7/30/08	Deputy Assistant Secretary of Energy (Oil and Natural Gas)	

[78] Memorandum from George W. Bush for Brian H. Hook (July 2, 2008) (designation and prior position); Dep't of State, *Biography, Brian H. Hook*, (Oct. 24, 2008), http://2001-2009.state.gov/r/pa/ei/biog/106592.htm (prior positions); 1 Dep't of State, *Foreign Affairs Manual* 332.1 (2007) (on file with the Office of the Solicitor General) (demonstrating that the Principal Deputy Assistant Secretary of State (International Organization Affairs) is the first assistant).

[79] Memorandum from George W. Bush for Gordon S. Heddell (July 14, 2008) (designation and prior position); *Nominations Before the Senate Armed Services Committee: Hearings Before the Senate Comm. on Armed Services*, 111th Cong., 1st Sess. 887 (2009) (prior positions, none of which were within the Department of Defense).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Michael W. Hager[81]	Director, Office of Personnel Management	8/14/08	8/1/08	Assistant Secretary of Veterans Affairs (Human Resources and Management) (Senate Confirmed)	

[80] Memorandum from George W. Bush for James A. Slutz (July 30, 2008) (designation and prior position); Wilson Ctr., *James A. Slutz, Bio* http://www.wilsoncenter.org/person/james-slutz (last visited Aug. 12, 2016) (prior positions). Although Slutz served as the Acting Principal Deputy Assistant Secretary between October 2007 and July 2008, see, *e.g.*, *Schools Get Coal Research Funds*, Inside Energy Extra, Nov. 21, 2007 (identifying Slutz as the Acting Principal Deputy Assistant Secretary); *Technologies Among Most Significant New Products Worldwide*, States News Service, July 10, 2008 (same), he was only acting in that position and did not hold the Principal Deputy position itself.

[81] Memorandum from George W. Bush for Michael W. Hager (Aug. 11, 2008) (designation, effective date of Aug. 14, 2008, and prior position); *Personnel Announcement* (Aug. 1, 2008), http://www.presidency.ucsb.edu/ws/?pid=84103 (giving Hager's two immediately prior positions as of August 2008, neither of which were in the Office of Personnel Management); *Nominations of the 110th Congress: Hearing Before the Senate Comm. on Veterans' Affairs*, 110th Cong., 1st Sess. 56 (2007) (prior positions as of November 2007, none of which were in the Office of Personnel Management).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Santanu K. Baruah[82]	Administrator, Small Business Administration	8/18/08	6/25/08	Assistant Secretary of Commerce (Economic Development) (Senate Confirmed)	

[82] Memorandum from George W. Bush for Santanu K. Baruah (Aug. 13, 2008) (designation, effective date of Aug. 18, 2008, and prior position); *Personnel Announcement* (June 25, 2008), http://www.presidency.ucsb.edu/ws/?pid=84022 (most recent prior positions, none of which were in the Small Business Administration); *Nominations of Santanu K. Baruah; George M. Gray; Lyons Gray; H. Dale Hall, and Edward McGaffigan, Jr.: Hearing Before the Senate Comm. on Environment and Public Works*, 109th Cong., 1st Sess. 16, 33 (2005) (prior positions as of September 2005, none of which were in the Small Business Administration).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
David Kelly[83]	Administrator, National Highway Traffic Safety Administration, Department of Transportation	9/2/08	9/29/08	Chief of Staff, National Highway Traffic Safety Administration, Department of Transportation	

[83] Memorandum from George W. Bush for David Kelly (Sept. 2, 2008) (designation and prior position); *Personnel Announcement* (Sept. 29, 2008), http://www.presidency.ucsb.edu/ws/?pid=84458 (prior positions); 49 C.F.R. 501.4(a) (2008) (identifying the Deputy Administrator as the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Jerry Gayle Bridges[84]	Inspector General, Department of Education	9/10/08	9/9/08	Chief Financial Officer, Corporation for National and Community Service (Senate Confirmed)	
Lafe Solomon[85]	General Counsel, National Labor Relations Board	6/21/10	1/5/11	Director, Office of Representation Appeals, National Labor Relations Board	

[84] Memorandum from George W. Bush for Jerry Gayle Bridges (Sept. 10, 2008) (designation and prior position); *Personnel Announcement* (Sept. 9, 2008), http://www.presidency.ucsb.edu/ws/?pid=84400 (prior positions, none of which were within the Department of Education).

[85] Memorandum from Barack Obama for Lafe E. Solomon (June 18, 2010) (designation, effective date of June 21, 2010, and prior position); Press Release, Office of the Gen. Counsel, NLRB, *Veteran NLRB Attorney Lafe Solomon Named Acting General Counsel* (June 20, 2010), http://cdn.cnsnews.com/documents/NLRB%20 press%20release.pdf (prior position).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Arun Majumdar[86]	Under Secretary of Energy	3/16/11	11/30/11	Director of Advanced Research Projects Agency-Energy, Department of Energy (Senate Confirmed)	

[86] Memorandum from Barack Obama for Arun Majumdar (Mar. 16, 2011) (designation and prior position); *Majumdar Nomination: Hearing Before the Senate Comm. on Energy and Natural Resources*, 112th Cong., 1st Sess. 6 (2011) (prior position). The Department of Energy informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Carol J. Galante[87]	Assistant Secretary of Housing and Urban Development (Federal Housing Commissioner)	7/12/11	10/20/11	Deputy Assistant Secretary of Housing and Urban Development for Multi-Family Housing Programs	12/30/12

[87] Memorandum from Barack Obama for Carol J. Galante (July 5, 2011) (designation, effective date of July 12, 2011, and prior position); *Nominations of Maurice A. Jones, Carol J. Galante, and Thomas H. Hoenig: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 112th Cong., 1st Sess. 7, 10 (2011) (prior position); 71 Fed. Reg. 61,500 (Oct. 18, 2006) (designating the General Deputy Assistant Secretary for Housing as the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Marcilynn Burke[85]	Assistant Secretary of the Interior (Land and Minerals Management)	7/28/11	2/6/12	Deputy Director for Programs and Policy, Bureau of Land Management, Department of the Interior	

[*] Memorandum from Barack Obama for Marcilynn A. Burke (July 28, 2011) (designation and prior position); *Sieminski, Burke, Clark, and Norris Nominations: Hearing Before the Senate Comm. on Energy and Natural Resources*, 112th Cong., 2d Sess. 1, 11 (2012) (prior position); Memorandum from Wilma Lewis to Ken Salazar (May 20, 2011) (on file with the Office of the Solicitor General) (explaining that the first assistant was a Deputy Assistant Secretary).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
B. Todd Jones[89]	Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice	8/30/11	1/24/13	U.S. Attorney (D. Minn.) (Senate Confirmed)	7/31/13
Rebecca M. Blank[90]	Deputy Secretary of Commerce	10/20/11	11/1/11	Under Secretary of Commerce for Economic Affairs (Senate Confirmed)	3/29/12

[89] Memorandum from Barack Obama for B. Todd Jones (Aug. 29, 2011) (designation, effective date of Aug. 30, 2011, and prior position); Dep't of Justice, *Organization Chart, Bureau of Alcohol, Tobacco, Firearms, and Explosives* (Oct. 17, 2005) (on file with the Office of the Solicitor General) (showing that a U.S. Attorney would not have been the first assistant).

[90] Memorandum from Barack Obama for Rebecca M. Blank (Oct. 20, 2011) (designation and prior position); *Nominations to the U.S. Department of Commerce and the Federal Trade Commission: Hearing Before the Senate*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Rose Eilene Gottemoeller[91]	Under Secretary of State (Arms Control and International Security)	2/7/12	9/11/12	Assistant Secretary of State (Verification and Compliance) (Senate Confirmed)	3/6/14
Stuart F. Delery[92]	Assistant Attorney General (Civil)	3/10/12	3/21/13	Counselor to the Attorney General	8/1/13

Comm. on Commerce, Science, and Transportation, 112th Cong., 1st Sess. 29 (2011) (prior position). The Department of Commerce informs this Office that at the relevant time, this position had no first assistant.

[91] Memorandum from Barack Obama for Rose Eilene Gottemoeller (Feb. 3, 2012) (designation, effective date of Feb. 7, 2012, and prior position). The State Department informs this Office that at the relevant time, this position had no first assistant.

[92] Memorandum from Barack Obama for Stuart F. Delery (Mar. 9, 2012) (designation, effective date of Mar. 10, 2012, and prior position); Sari Horwitz, *Tony West Is Promoted to Associate Attorney General*, Washington Post, Feb. 28, 2012, at A02 (vacancy creation date); U.S. Senate Comm. on the Judiciary, *Questionnaire for Non-Judicial Nominees* 1-2, https://www.judiciary.senate.gov/imo/media/doc/Delery%20Senate%20Questionnaire%20Final.pdf

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Tony West[93]	Associate Attorney General	3/10/12	9/20/12	Assistant Attorney General (Civil) (Senate Confirmed)	7/25/13
Jessica Lynn Wright[94]	Under Secretary of Defense (Personnel and Readiness)	1/1/13	7/18/13	Assistant Secretary of Defense (Reserve Affairs) (Senate Confirmed)	6/25/14

(prior positions, including showing that service as the Principal Deputy Assistant Attorney General did not begin until November 2012); 28 C.F.R. 0.137(b) (2012) (indicating that the principal deputy is the first assistant).

[93] Memorandum from Barack Obama for Tony West (Mar. 9, 2012) (designation, effective date of Mar. 10, 2012, and prior position); Dep't of Justice, *Meet the Associate Attorney General* (Sept. 17, 2014), https://www.justice.gov/asg/meet-associate-attorney-general-old (prior positions); 28 C.F.R. 0.137(b) (2012) (indicating that the Principal Deputy is the first assistant); House Comm. on Oversight and Government Reform, 112th Cong., 2d Sess., *Policy and Supporting Positions* 93 (Comm. Print 2012) (*2012 Plum Book*) (showing the existence of a principal deputy position).

[94] Memorandum from Barack Obama for Jessica Lynn Wright (Dec. 28, 2012) (designation, effective date of Jan. 1, 2013, and prior position); Dep't of Defense, *Biography, Jessica L. Wright, Acting Under Secretary of De-*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Kathryn Thomson[96]	General Counsel, Department of Transportation	5/2/13	9/23/13	Chief Counsel, Federal Aviation Administration, Department of Transportation	3/27/04

fense for Personnel and Readiness (July 10, 2013), http://docs.house.gov/meetings/AS/AS00/20130710/101105/HHRG-113-AS00-Bio-WrightJ-20130710.pdf (prior positions); 10 U.S.C. 137a (identifying the Principal Deputy Under Secretary of Defense (Personnel and Readiness) as the first assistant).

[96] Memorandum from Barack Obama for Kathryn Thomson (May 2, 2013) (designation and prior position); Dep't of Transp. *Kathryn B. Thomson*, https://cms.dot.gov/administrations/office-general-counsel/kathryn-b-thomson (April 22, 2014) (prior positions); Dep't of Transp., *Position Description, Deputy General Counsel* (July 24, 2009) (on file with the Office of the Solicitor General) (identifying the Deputy General Counsel as the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
James H. Shelton, III[96]	Deputy Secretary of Education	6/10/13	9/11/13	Assistant Deputy Secretary of Education for Innovation and Improvement	3/12/14
Jonodev Chaudhuri[97]	Chairman, National Indian Gaming Commission, Department of the Interior	10/28/13	7/22/14	Member and Vice Chairman of the National Indian Gaming Commission, Department of the Interior	4/16/15

[96] Memorandum from Barack Obama for James H. Shelton, III (June 10, 2013) (designation and prior position). The Department of Education informs this Office that at the relevant time, this position had no first assistant.

[97] Memorandum from Barack Obama for Jonodev Osceola Chaudhuri (Oct. 28, 2013) (designation and prior position); *Nomination of Jonodev Osceola Chaudhuri to be Chairman of the National Indian Gaming Commission: Hearing Before the Senate Comm. on Indian Affairs*, 113th Cong., 2d Sess. 10 (2014) (prior positions, including that his service as the Vice Chair only began in September 2013); Lenzy Krehbiel-Burton, *Muscogree (Creek) Nation Ci-*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Victor M. Mendez[98]	Deputy Secretary of Transportation	12/30/13	5/15/14	Administrator, Federal Highway Administration, Department of Transportation (Senate Confirmed)	7/24/14

tizen Nominated to Lead National Indian Gaming Commission, Tulsa World, July 25, 2014, http://www.tulsworld.com/news/state/muscogee-creek-nation-citizen-nominated-to-lead-national-indian-gaming/article_f3298aa3-5050-5689-87c8-a59550407a51.html (explaining that the vacancy arose in September 2013).

[98] Memorandum from Barack Obama for Victor M. Mendez (Dec. 18, 2013) (designation, effective date of Dec. 30, 2013, and prior position). The Department of Transportation informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Peter M. Rogoff[99]	Under Secretary of Transportation for Policy	1/25/14	5/15/14	Administrator, Federal Transit Administration, Department of Transportation (Senate Confirmed)	7/24/14

[99] Memorandum from Barack Obama for Peter M. Rogoff (Jan. 24, 2014) (designation, effective date of Jan. 25, 2014, and prior position); *Nominations to the U.S. Department of Commerce, the U.S. Department of Transportation, and the Consumer Production Safety Commission: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 113th Cong., 2d Sess. 30-31 (2014) (prior positions); Memorandum from the Secretary of Transportation to the Assistant Secretary for Transportation Policy (May 25, 2003) (on file with the Office of the Solicitor General) (designating the Assistant Secretary for Transportation Policy as the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Amias Moore Gerety[100]	Assistant Secretary of the Treasury (Financial Institutions)	4/6/14	2/25/15	Deputy Assistant Secretary of the Treasury for the Financial Stability Oversight Council	Nomination pending

[100] Memorandum from Barack Obama for Amias Moore Gerety (Mar. 31, 2014) (designation, effective date of Apr. 6, 2014, and prior position); Press Release, Office of the Press Secretary, The White House, *President Obama Announces More Key Administration Posts* (Feb. 24, 2015), https://www.whitehouse.gov/the-press-office/2015/02/24/president-obama-announces-more-key-administration-posts (prior positions); Timothy F. Geithner, Sec'y of the Treasury, *Designation of First Assistants to Offices in the Department* (June 25, 2012) (on file with the Office of the Solicitor General) (designating as first assistant the Deputy Assistant Secretary for Small Business, Housing, and Community Development Policy).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Bruce H. Andrews[101]	Deputy Secretary of Commerce	6/9/14	5/22/14	Chief of Staff, Office of the Secretary of Commerce	7/24/14
Thomas F. Scott Darling, III[102]	Administrator, Federal Motor Carrier Safety Administration, Department of Transportation	8/25/14	8/5/15	Chief Counsel, Federal Motor Carrier Safety Administration, Department of Transportation	7/14/16

[101] Memorandum from Barack Obama for Bruce H. Andrews (June 4, 2014) (designation, effective date of June 9, 2004, and prior position). The Department of Commerce informs this Office that at the relevant time, this position had no first assistant.

[102] Memorandum from Barack Obama for Thomas F. Scott Darling, III (Aug. 25, 2014) (designation and prior position); Federal Motor Carrier Safety Admin., *Administrator*, https://www.fmcsa.dot.gov/mission/leadership/administrator-0 (July 25, 2016) (prior positions); Fed. Motor Carrier Safety Admin., Order, *Order of Succession for*

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Stuart Delery[103]	Associate Attorney General (Civil)	9/16/14	1/27/15	Assistant Attorney General (Civil) (Senate Confirmed)	

the Administrator 1102.1c (Oct. 18, 2012) (on file with the Office of the Solicitor General) (identifying the Deputy Administrator as the first assistant).

[103] Memorandum from Barack Obama for Stuart F. Delery (Sept. 16, 2014) (designation and prior position); Press Release, Office of the Press Secretary The White House, *President Obama Announces More Key Administration Posts* (Jan. 22, 2015), https://www.whitehouse.gov/the-press-office/2015/01/22/president-obama-announces-more-key-administration-posts (prior positions); Press Release, Dep't of Justice, *Attorney General Holder Announces Stuart Delery to Serve as Acting Associate Attorney General* (Sept. 5, 2014), https://www.justice.gov/opa/pr/attorney-general-holder-announces-stuart-delery-serve-acting-associate-attorney-general; 28 C.F.R. 0.137(b) (indicating that the Principal Deputy is the first assistant); *2012 Plum Book* 93 (showing the existence of a principal deputy position).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Albert Stanley Meiburg[104]	Deputy Administrator, Environmental Protection Agency	10/3/14	1/27/15	Senior Advisor to the Administrator, Environmental Protection Agency	Nomination pending
Karen Bollinger DeSalvo[105]	Assistant Secretary of Health and Human Services (Health)	10/22/14	5/7/15	National Coordinator for Health Information Technology, Department of Health and Human Services	Nomination pending

[104] Memorandum from Barack Obama for Albert Stanley Meiburg (Oct. 3, 2014) (designation and prior position). The Environmental Protection Agency informs this Office that at the time the vacancy began, this position had no first assistant.

[105] Memorandum from Barack Obama for Karen Bollinger DeSalvo (Oct. 22, 2014) (designation and prior position); Dept of Health & Human Servs., *Karen B. DeSalvo, MD, MPH, Msc* (May 5, 2016), http://www.hhs.gov/about/

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Sally Quillian Yates[106]	Deputy Attorney General	1/11/15	1/8/15	U.S. Attorney (N.D. Ga.) (Senate Confirmed)	5/13/15

leadership/karen-desalvo/index.html# (prior position); *2012 Plum Book* 61-62 (demonstrating that DeSalvo's prior HHS position was not within the Office of the Assistant Secretary for Health).

[106] Memorandum from Barack Obama for Sally Quillian Yates (Jan. 9, 2015) (designation and effective date of Jan. 11, 2015); U.S. Senate Comm. on the Judiciary, *Questionnaire for Non-Judicial Nominees* 1-2, https://www.judiciary.senate.gov/imo/media/doc/2015%20DAG%20Nom%20Yates%20SJQ%20Public%20Questionnaire.pdf (prior positions); 28 C.F.R. 0.137(b) (explaining that the "Principal Deputy" to a position is the first assistant); *2012 Plum Book* 89 (showing the existence of a Principal Associate Deputy Attorney General position).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Seth B. Carpenter[107]	Assistant Secretary of the Treasury (Financial Markets)	1/30/15	9/8/14	Deputy Assistant Secretary of the Treasury (Economic Policy)	

[107] Memorandum from Barack Obama for Seth B. Carpenter (Jan. 30, 2015) (designation and prior position); Dep't of the Treasury, *About, Seth Carpenter* (Aug. 20, 2015), http://www.treasury.gov/about/organizational-structure/pages/carpenter-e.aspx (designation and earlier positions); Timothy F. Geithner, Sec'y of the Treasury, *Designation of First Assistants to Offices in the Department* (June 25, 2012) (on file with the Office of the Solicitor General) (designating as first assistant the Deputy Assistant Secretary for Federal Finance).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Adam J. Szubin[108]	Under Secretary of the Treasury (Terrorism and Financial Crimes)	2/9/15	4/20/15	Director, Office of Foreign Assets Control, Department of the Treasury	Nomination pending
Brad R. Carson[109]	Under Secretary of Defense (Personnel and Readiness)	4/2/15	7/8/15	Under Secretary of the Army (Senate Confirmed)	

[108] Memorandum from Barack Obama for Adam J. Szubin (Feb. 6, 2015) (designation, effective date of Feb. 9, 2015, and prior position); Dep't of the Treasury, *About, Adam J. Szubin* (Aug. 24, 2015), http://www.treasury.gov/about/organizational-structure/pages/szubin-a.aspx (prior positions); Jacob J. Lew, Sec'y of the Treasury, *Designation of First Assistants to Offices in the Department of the Treasury* (Aug. 26, 2014) (on file with the Office of the Solicitor General) (designating as first assistant the Assistant Secretary for Terrorist Financing).

[109] Memorandum from Barack Obama for Brad R. Carson (Apr. 2, 2015) (designation and prior position); Office of the Under Sec'y for Pers. & Readiness, Dep't of Def., *Performing the Duties of the PDUSD*, http://prhome.defense.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Mary Wakefield[110]	Deputy Secretary of Health and Human Services	4/14/15	7/13/15	Administrator, Health Resources and Services Administration, Department of Health and Human Services	Nomination pending

gov/Leadership/bradCarson.aspx (last visited Aug. 12, 2016) (prior positions); 10 U.S.C. 137a (identifying the Principal Deputy Under Secretary of Defense (Personnel and Readiness) as the first assistant).

[110] Memorandum from Barack Obama for Mary Wakefield (Apr. 8, 2015) (designation, effective date of Apr. 14, 2015, and prior position). The Department of Health and Human Services informs this Office that at the relevant time, this position had no first assistant.

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Karl Boyd Brooks[111]	Assistant Administrator (Administration and Resources Management), Environmental Protection Agency	5/13/15	5/14/15	Deputy Assistant Administrator (Administration and Resource Management), Environmental Protection Agency	

[111] Memorandum from Barack Obama for Karl Boyd Brooks (May 13, 2015) (designation and prior position); Press Release, Office of the Press Secretary, The White House, *President Obama Announces More Key Administration Posts* (May 13, 2015), https://www.whitehouse.gov/the-press-office/2015/05/13/president-obama-announces-more-key-administration-posts (prior positions, none of which was the principal deputy); Daniel Arrieta, *After Departures, McCarthy Taps 'Acting' Officials to Fill Crucial Vacancies*, Inside Washington Publishers, http://iwpnews.com/EPA-Daily-News/Daily-News/feed/rss/menu-id-1046/Page-20.html, Aug. 10, 2016 (showing that a different individual served as principal deputy at the time the vacancy was created).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Sarah Elizabeth Feinberg[112]	Administrator, Federal Railroad Administration, Department of Transportation	6/2/15	6/2/15	Deputy Administrator of the Federal Railroad Administration, Department of Transportation	10/28/15

[112] Memorandum from Barack Obama for Sarah Elizabeth Feinberg (June 2, 2015) (designation and prior position); Progressive Railroading, *Joseph Szabo Says Goodbye to Federal Railroad Administration, Hello to Chicago Planning Agency* (Jan. 2015), http://www.progressiverailroading.com/people/article/Joseph-Szabo-says-goodbye-to-Federal-Railroad-Administration-hello-to-Chicago-planning-agency--43214 (vacancy created in January 2015); *Nomination of Sarah E. Feinberg to be Administrator, Federal Railroad Administration, U.S. Department of Transportation: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 114th Cong., 1st Sess. 11 (2015) (prior positions, including that Feinberg only became the Deputy Administrator in January 2015); Fed. R.R. Admin., *Order 1100.23F, Change 1*, at 12 (Sept. 10, 2012) (on file with the Office of the Solicitor General) (identifying the Deputy Administrator as the first assistant).

Name	Acting Position	Designation Date	Nomination Date	Most Recent Position on Date of Designation	Confirmation Date, Where Applicable
Beth F. Cobert[113]	Director, Office of Personnel Management	7/10/15	11/10/15	Deputy Director for Management, Office of Management and Budget	Nomination pending

[113] Memorandum from Barack Obama for Beth F Cobert (July 10, 2015) (designation and prior position); OPM, *Beth F. Cobert, Acting Director*, https://www.opm.gov/about-us/our-people-organization/senior-staff-bios/beth-f-cobert/ (last visited Aug. 12, 2016) (designation and prior positions, none of which were in the Office of Personnel Management).

APPENDIX B

1. 5 U.S.C. 3345 provides:

Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer

or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

2. 5 U.S.C. 3346 provides:

Time limitation

(a) Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office—

(1) for no longer than 210 days beginning on the date the vacancy occurs; or

(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.

(b)(1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return.

(2) Notwithstanding paragraph (1), if a second nomination for the office is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve—

(A) until the second nomination is confirmed; or

(B) for no more than 210 days after the second nomination is rejected, withdrawn, or returned.

(c) If a vacancy occurs during an adjournment of the Congress sine die, the 210-day period under subsection (a) shall begin on the date that the Senate first reconvenes.

3. 5 U.S.C. 3347 provides:

Exclusivity

(a) Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless—

(1) a statutory provision expressly—

(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(1) applies.

4. 5 U.S.C. 3348 provides:

Vacant office

(a) In this section—

(1) the term "action" includes any agency action as defined under section 551(13); and

(2) the term "function or duty" means any function or duty of the applicable office that—

(A)(i) is established by statute; and

(ii) is required by statute to be performed by the applicable officer (and only that officer); or

(B)(i)(I) is established by regulation; and

(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

(ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the office shall remain vacant; and

(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office), only the head of such Executive agency may perform any function or duty of such office.

(c) If the last day of any 210-day period under section 3346 is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

(d)(1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided

by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.

(2) An action that has no force or effect under paragraph (1) may not be ratified.

(e) This section shall not apply to—

(1) the General Counsel of the National Labor Relations Board;

(2) the General Counsel of the Federal Labor Relations Authority;

(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;

(4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or

(5) an office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.

5. 5 U.S.C. 3349 provides:

Reporting of vacancies

(a) The head of each Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) shall submit to

the Comptroller General of the United States and to each House of Congress—

(1) notification of a vacancy in an office to which this section and sections 3345, 3346, 3347, 3348, 3349a, 3349b, 3349c, and 3349d apply and the date such vacancy occurred immediately upon the occurrence of the vacancy;

(2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation;

(3) the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and

(4) the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.

(b) If the Comptroller General of the United States makes a determination that an officer is serving longer than the 210-day period including the applicable exceptions to such period under section 3346 or section 3349a, the Comptroller General shall report such determination immediately to—

(1) the Committee on Governmental Affairs of the Senate;

(2) the Committee on Government Reform and Oversight of the House of Representatives;

(3) the Committees on Appropriations of the Senate and House of Representatives;

(4) the appropriate committees of jurisdiction of the Senate and House of Representatives;

(5) the President; and

(6) the Office of Personnel Management.

6. 5 U.S.C. 3349a provides:

Presidential inaugural transitions

(a) In this section, the term "transitional inauguration day" means the date on which any person swears or affirms the oath of office as President, if such person is not the President on the date preceding the date of swearing or affirming such oath of office.

(b) With respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 210-day period under section 3346 or 3348 shall be deemed to begin on the later of the date occurring—

(1) 90 days after such transitional inauguration day; or

(2) 90 days after the date on which the vacancy occurs.

7. 5 U.S.C. 3349b provides:

Holdover provisions

Sections 3345 through 3349a shall not be construed to affect any statute that authorizes a person to continue to serve in any office—

(1) after the expiration of the term for which such person is appointed; and

(2) until a successor is appointed or a specified period of time has expired.

8. 5 U.S.C. 3349c provides:

Exclusion of certain officers

Sections 3345 through 3349b shall not apply to—

(1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that—

(A) is composed of multiple members; and

(B) governs an independent establishment or Government corporation;

(2) any commissioner of the Federal Energy Regulatory Commission;

(3) any member of the Surface Transportation Board; or

(4) any judge appointed by the President, by and with the advice and consent of the Senate, to a court constituted under article I of the United States Constitution.

9. 5 U.S.C. 3349d provides:

Notification of intent to nominate during certain recesses or adjournments

(a) The submission to the Senate, during a recess or adjournment of the Senate in excess of 15 days, of a written notification by the President of the President's intention to submit a nomination after the recess or adjournment shall be considered a nomination for purposes of sections 3345 through 3349c if such notification contains the name of the proposed nominee and the office for which the person is nominated.

(b) If the President does not submit a nomination of the person named under subsection (a) within 2 days after the end of such recess or adjournment, effective after such second day the notification considered a nomination under subsection (a) shall be treated as a withdrawn nomination for purposes of sections 3345 through 3349c.

SEP 19

No. 15-1251

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SW GENERAL, INC.,
DOING BUSINESS AS SOUTHWEST AMBULANCE,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Section 3345(b)(1) of the Federal Vacancies Reform Act, 5 U.S.C. § 3345, *et seq.*, limits when a permanent nominee for a vacant office may also serve temporarily as the acting official. The question presented is whether that limitation applies to all temporary officials serving under 5 U.S.C. § 3345(a), or whether it is irrelevant to officials who assume acting responsibilities under Subsections (a)(2) and (a)(3).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding below are identified in the caption to the case.

Respondent SW General, Inc., d/b/a Southwest Ambulance, is a wholly owned subsidiary of Rural/Metro Corporation. Rural/Metro Corporation is a wholly owned subsidiary of American Medical Response, Inc., which is a subsidiary of Envision Healthcare Corporation. Envision Healthcare Corporation is a subsidiary of Envision Healthcare Holdings, Inc., a publicly held company (NYSE: EVHC). No other publicly held corporation owns 10% or more of Respondent's stock.

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Barnhart v. Peabody Coal Co.,
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Bond v. United States,
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Brown v. Gardner,
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Buckley v. Valeo,
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Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
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Cisneros v. Alpine Ridge Grp.,
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Corley v. United States,
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Crandon v. United States,
494 U.S. 152 (1990) 54

Deutsche Bank Nat'l Trust Co. v. Tucker,
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Doe v. Chao,
540 U.S. 614 (2004) 45, 50

TABLE OF AUTHORITIES
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Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision, 139 F.3d 203 (D.C. Cir. 1998) 10

Edmond v. United States, 520 U.S. 651 (1997) 3, 35

Edwards' Lessee v. Darby, 25 U.S. 206 (1827) 54

Estate of Flanigan v. Comm'r, 743 F.2d 1526 (11th Cir. 1984) 26

Franklin v. Massachusetts, 505 U.S. 788 (1992) 36

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Gustafson v. Alloyd Co., 513 U.S. 561 (1995) 29

Hooks v. Kitsap Tenant Support Servs., Inc., 816 F.3d 550 (9th Cir. 2016) ..... *passim*

In the Matter of Lifschultz Fast Freight Corp., 63 F.3d 621 (7th Cir. 1995) 38, 39

In re Bulldog Trucking, Inc., 66 F.3d 1390 (4th Cir. 1995) 38

In re Jones Trucking Lines, Inc., 57 F.3d 642 (8th Cir. 1995) 38

Jefferson Cnty. Pharmaceutical Ass'n, Inc. v. Abbott Labs., 460 U.S. 150 (1983) 24

Kloeckner v. Solis, 133 S. Ct. 596 (2012) 46

TABLE OF AUTHORITIES
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Koons Buick Pontiac GMC, Inc. v. Nigh,
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Kucana v. Holder,
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Lindh v. Murphy,
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N.L.R.B. v. Noel Canning,
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North Haven Bd. of Educ. v. Bell,
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Perry v. First Nat'l Bank,
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Pfizer v. Gov't of India,
434 U.S. 308 (1978) 24

RadLAX Gateway Hotel, LLC v. Amalgamated Bank,
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Rapanos v. United States,
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Sandifer v. U.S. Steel Corp.,
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Summit Petroleum Corp. v. E.P.A.,
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Solid Waste Agency v. U.S. Army Corps of Engineers,
531 U.S. 159 (2001) 60

TABLE OF AUTHORITIES
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United States ex rel. Holmes v. Consumer Ins. Grp., 318 F.3d 1199 (10th Cir. 2003) 24

United States v. Mills, 140 F.3d 630 (6th Cir. 1998) 26

United States v. Wells, 519 U.S. 482 (1997) 59

Vermont Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 24

Watson v. United States, 552 U.S. 74 (2007) 60

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) 36

Williams v. Taylor, 529 U.S. 362 (2000) 29

Zuber v. Allen, 396 U.S. 168 (1969) 59

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5 U.S.C. § 3345(a) 33

5 U.S.C. § 3345(a)(1) ..... *passim*

5 U.S.C. § 3345(a)(2) ..... *passim*

5 U.S.C. § 3345(a)(3) ..... *passim*

5 U.S.C. § 3345(a)(3)(B) 26

5 U.S.C. § 3345(b) 35

5 U.S.C. § 3345(b)(1) ..... *passim*

TABLE OF AUTHORITIES
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5 U.S.C. § 3345(b)(1)(A) 18, 33, 50
5 U.S.C. § 3345(b)(1)(A)(i) 18, 31
5 U.S.C. § 3345(b)(1)(B) 31
5 U.S.C. § 3345(b)(2) ..... *passim*
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Act of Feb. 13, 1795, ch. 21, 1 Stat. 415 5
Act of Feb. 20, 1863, ch. 45, 12 Stat. 656 5
Act of July 23, 1868, ch. 227, 15 Stat. 168 5
Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281 4
Pub. L. No. 89-554, 80 Stat. 424, §§ 3345-3349 (1966) 6
Pub. L. No. 100-398, 102 Stat. 985 (1988) 7, 10, 34
U.S. Const. art. II, § 2 ..... 1, 3, 35

OTHER AUTHORITIES

144 Cong. Rec.:
(daily ed. Sept. 28, 1998)
Page 22,507 54
Page 22,508 9
Page 22,509 9

TABLE OF AUTHORITIES
(continued)

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Page 22,520 12
(daily ed. Oct. 21, 1998)
Page 27,496 52
Page 27,497 52
Page 27,498 ..... 52, 53

159 Cong. Rec. (daily ed. Jan. 3, 2013) 16
Page S17 16

Antonin Scalia & Bryan A. Garner, *Reading the Law: The Interpretation of Legal Texts* (2012) 27

Black's Law Dictionary (10th ed. 2014) 27

Black's Law Dictionary (6th ed. 1990) 24

Cong. Globe, 40th Cong., 2d Sess., 1163 (1868) 6

Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177 (2001) 31, 55

Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60 (1999) 31, 55

TABLE OF AUTHORITIES
(continued)

Page(s)

H. Comm. on Oversight & Gov't Reform, 112th Cong., Policy and Supporting Positions (Comm. Print 2012) 50

House Legislative Counsel's Manual on Drafting Style, HLC No. 104-1 (1995) 25

L. Filson, *The Legislative Drafter's Desk Reference* (1992) 25

Letter from Carlotta C. Joyner, Director, Strategic Issues, to Fred Thompson, Chiarman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R (Feb. 23, 2001), http://www.gao.gov/assets/80/75036.pdf 55

Letter to Spencer Roane (Sept. 2, 1819), in Writings of James Madison (G. Hunt ed. 1908) 59

Memorandum from Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* (Jan. 14, 1998) ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

Merit Systems Protection Board, *In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees Outside the Federal Government* (2008) http://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=323118 51

Oversight of the Implementation of the Vacancies Act: Hearing Before the Senate Comm. on Governmental Affairs, 105th Cong., 2d Sess. (1998) .....*passim*

Oxford English Dictionary (2d ed. 1989) 27

Morton Rosenberg, Cong. Research Serv., CRS-98-892 *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* (1998) 8

S. 2176, 105th Cong., 2d Sess. .....*passim*

S. Rep. No. 89-1380 (1966) 6

S. Rep. No. 100-317 (1988) 7

S. Rep. No. 105-250 (1998) .....*passim*

Senate Office of the Legislative Counsel, *Legislative Drafting Manual* (1997) 25

TABLE OF AUTHORITIES
(continued)

Page(s)

The Chicago Manual of Style (16th ed. 2010) 27

The Federalist No. 76 (Clinton Rossiter ed. 1961) 3

The White House, Office of the Press Secretary, "President Obama Announces Recess Appointments to Key Administration Posts," 2012 WLNR 179638 (Jan. 4, 2012) 58

The White House, Office of the Press Secretary, "President Clinton Names Bill Lann Lee as Assistant Attorney General for Civil Rights at the Department of Justice," 2000 WL 1071925 (Aug. 3, 2000) 9, 48

The White House, Office of the Press Secretary, "Remarks by the President at Announcement of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights," 1997 WL 770918 (Dec. 15, 1997) 9

Tobias A. Dorsey, *Legislative Drafter's Deskbook: A Practical Guide* (2006) 44

U.S. Dep't of Justice, Office of Legal Counsel, *Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010), http://goo.gl/g2OIVu 55

Webster's Third New International Dictionary (1986) 27

STATEMENT

The Appointments Clause of the Constitution provides that "Officers of the United States" "shall" be nominated by the President "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. Nevertheless, Congress has recognized that vacancies can occur unexpectedly and that the confirmation process takes time. Therefore, Congress has long given the President limited authority to designate acting officers to serve as temporary caretakers for vacant positions requiring Presidential appointment and Senate confirmation (so-called PAS positions). But in the decades leading up to the enactment of the Federal Vacancies Reform Act (FVRA), 5 U.S.C. § 3345 *et seq.*, Presidents from both political parties used acting service to circumvent the advice-and-consent requirement altogether. Presidents directed their chosen replacements to perform the functions of a vacant PAS position in an acting capacity—often for years at a time. Congress enacted the FVRA to reclaim its constitutionally mandated role in the appointments process.

When a PAS officer dies, resigns, or is otherwise unable to perform his duties, the FVRA authorizes an individual from among a specified pool to serve temporarily as an acting official until the Senate confirms a permanent replacement. Section 3345(a)(1) sets forth an automatic-succession rule: The first assistant to the vacant office "shall" become the acting officer. *Id.* The President may override this self-executing rule by directing an individual already holding a different PAS office within the government, or a senior employee within the agency,

to serve as the acting officer. *See id.* § 3345(a)(2), (a)(3).

But Congress did not want the President to use acting service to evade the Senate's advice-and-consent role. Section 3345(b)(1) accordingly provides that "a person" who is nominated for a vacant PAS position requiring Senate confirmation "may not serve as an acting officer for an office under this section" unless he is a long-serving or Senate-confirmed first assistant. *Id.* § 3345(b)(1). Section 3345(b)(1)'s introductory clause—"notwithstanding subsection (a)(1)"—underscores the broad application of the words that follow it by making clear that the prohibition on acting service by nominees applies even when it conflicts with Subsection (a)(1)'s automatic mandate.

As the D.C. Circuit correctly explained, Section 3345(b)(1)'s language unambiguously applies to all acting officers.

A. The FVRA, Prior Vacancies Acts, And Their Constitutional Backdrop

1. The Senate's advice and consent provides an important check on the President's appointment power

The Appointments Clause provides a critical restraint on the President's power to unilaterally appoint officers of the United States. The Framers believed that such power was "the most insidious and powerful weapon of eighteenth century despotism." *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991). The Constitution cabins that power by "dividing" it "between the Executive and Legislative Branches." *Id.* at 884. Thus, while the President alone has the

power to nominate officers of the United States, those individuals generally cannot assume office unless and until the Senate consents. *See* U.S. Const. art. II, § 2, cl. 2; *see also N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014).

This system of checks and balances has many virtues. By vesting the power of nomination in the President, the Framers sought "to assure a higher quality of appointments." *Edmond v. United States*, 520 U.S. 651, 659 (1997). "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation." *The Federalist No. 76*, at 455 (Hamilton) (Clinton Rossiter ed. 1961). But the Framers also recognized that "a man who had himself the sole disposition of offices[] would be governed much more by his private inclinations and interests." *Id.* at 457. Requiring the President "to submit the propriety of his choice to the discussion and determination of a different and independent body"—the Senate—accordingly provides "an excellent check upon a spirit of favoritism in the President." *Id.* Moreover, the "joint participation of the President and the Senate" helps "ensure public accountability for both the making of a bad appointment and the rejection of a good one." *Edmond*, 520 U.S. at 660.

The Constitution recognizes only two exceptions to the advice-and-consent requirement. The first is the President's narrow power to make recess appointments. *See* U.S. Const., art. II, § 2, cl. 3. The second is Congress's discretion to "vest the appointment of ... inferior officers, as [it] think[s] proper, in the President alone, in courts of law, or in the heads of departments." *Id.* § 2, cl. 2.

2. Congress has long given the President *limited* authority to staff vacancies temporarily, without the need to obtain Senate approval

Despite the requirements of the Appointments Clause, Congress has given the President carefully circumscribed authority to appoint acting officials to fill vacancies temporarily without first obtaining the Senate's approval. But consistent with the structural safeguards of the Appointments Clause, the purpose of these temporary caretakers is to keep the government running during the confirmation process—not to allow the President to sidestep the Senate's approval of long-term officeholders. Thus, from their earliest iterations, acts authorizing temporary appointments have limited the types of positions that acting officials may fill, the circumstances in which they may do so, who may serve as an acting official, and for how long. Moreover, reflecting Congress's vigilance about its advice-and-consent role, whenever Congress has expanded the President's authority to appoint acting officials in some respects, it has constrained it in others.

a. The first statute authorizing acting service allowed the President to appoint "any person" to perform the duties of a vacant office. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281. But it applied only to specified positions vacated for particular reasons (e.g., sickness or death). *See id.* Moreover, although Congress initially allowed an acting officer to serve until the permanent officeholder resumed his duties or a new one was appointed, *id.*, Congress promptly

amended the law to impose a six-month limit on acting service, Act of Feb. 13, 1795, ch. 21, 1 Stat. 415.

b. In 1863, Congress both expanded and contracted the President's power to appoint temporary officials. *See* Act of Feb. 20, 1863, ch. 45, 12 Stat. 656. The new law allowed the President to fill vacancies arising from an officer's resignation, not just sickness, death, or "absence from the seat of Government." *Id.* It also covered vacancies in additional positions. *Id.* In return for this added flexibility, Congress stripped the President of the ability to appoint anyone he wanted as an acting official; under the new law, acting officials could only be already-appointed officers in an Executive Department. *See id.*

c. Five years later, Congress passed the Vacancies Act. *See* Act of July 23, 1868, ch. 227, 15 Stat. 168-69. This new law, which repealed all earlier laws addressing vacancies, became the exclusive authority for temporarily assigning the duties of a vacant office. *See id.* § 4. The Vacancies Act allowed temporary appointments to more positions than its predecessors. *Id.* §§ 1-2. It also redefined the pool of eligible acting officials to include the "first or sole assistant" to the vacant office and officers already holding different PAS positions within the government. *Id.* §§ 1-3.

At the same time, however, Congress imposed a significant new limit on the President's authority. The Vacancies Act reduced the permissible time for acting service from six months to a mere ten days. *See id.* § 3. Congress determined that the preexisting six-month limit was "an unreasonable length of time"

to allow the President to "suppl[y] ... vacancies ... without submitting [a nomination] to the Senate." Cong. Globe, 40th Cong., 2d Sess., 1163 (1868) (statement of Sen. Trumbull). "[V]acancies ought to be filled just as quick as the President can have reasonable time to turn round and fill them," and "ten days would be enough." *Id.* (statement of Sen. Fessenden).

With the exception of an amendment almost a quarter-century later increasing the permissible length of acting service from ten to 30 days, the Vacancies Act remained largely unchanged for the next 120 years. *See* Act of Feb. 6, 1891, ch. 113, 26 Stat. 733; Pub. L. No. 89-554, 80 Stat. 424, 425-26 §§ 3345-3349 (1966) (recodifying title 5); *see* S. Rep. No. 89-1380, at 20, 70-71 (1966).

d. Following the significant growth of the administrative state and the number of PAS positions in the mid-twentieth century, the Executive Branch began flouting the Vacancies Act's requirements. *See* Memorandum from Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* 17-19 (Jan. 14, 1998) (*CRS Validity Memo*) (exhibit to *Oversight of the Implementation of the Vacancies Act: Hearing Before the Senate Comm. on Governmental Affairs*, 105th Cong., 2d Sess. 62-100 (1998) (*Vacancies Act Hearing*)). Many agencies believed that the Act's 30-day time limit was "such a ridiculously short moment of time" that "it could not possibly apply to them." *Vacancies Act Hearing* 182. They claimed that other, agency-specific statutes provided alternative avenues for filling vacancies. *See CRS Validity Memo* 17-19.

For example, the Department of Justice (DOJ) argued that the Attorney General's authority to delegate duties within the Department included the authority to fill vacancies with whomever he wanted, for however long. *See id.* (discussing similar positions of HHS, Education, and Labor Departments); *see also Vacancies Act Hearing* 11, 116-17.

After decades of disregard by the Executive Branch, Congress responded in 1988 by making two key changes designed to "revitalize the Vacancies Act." S. Rep. No. 100-317, at 14 (1988). *First*, Congress extended the Act's time limit from 30 to 120 days, and tolled this period while a nomination was pending. *See* Pub. L. No. 100-398, § 7(b), 102 Stat. 985, 988 (1988); S. Rep. No. 100-317 at 23. "By giving more leeway to the President to find a nominee and tying the time limitation on 'actings' to the prompt forwarding of nominations, the Committee believed it made more effective and clear the Section 3349 declaration that the Act's provisions are the sole means for filling vacancies in covered agencies." *Vacancies Act Hearing* 177; *see also* S. Rep. No. 100-317 at 14. *Second*, Congress eliminated any remaining doubt about the Vacancies Act's scope by amending it to refer explicitly to executive agencies. *See* Pub. L. No. 100-398, § 7(a), 102 Stat. at 988; S. Rep. No. 100-317 at 14, 23.

3. In the years leading to the FVRA's enactment, Presidents from both parties circumvent statutory restrictions on temporary officials

These changes to the Vacancies Act were not enough. Presidents from both political parties continued to use acting service to put their chosen replacements to work immediately and for lengthy periods, without obtaining the Senate's approval.

This problem manifested itself in numerous ways. Some administrations maintained that the Vacancies Act was inapplicable to certain agencies. *See Vacancies Act Hearing* 128-31; *see* S. Rep. No. 105-250, at 3 (1998). And Presidents from both parties continued to staff vacant positions without regard to the Act's time limit. By the late 1990s, approximately 20% of PAS positions in Executive departments were being filled by "temporary designees, most of whom had served well beyond the 120-day limitation period of the [Vacancies] Act without presidential submissions of nominations." Morton Rosenberg, Cong. Research Serv., CRS-98-892 *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* 1 (1998); *see* S. Rep. No. 105-250 at 5.

The most egregious offender was DOJ. As of May 1997, "almost all of the top positions at the Justice Department were being filled in an acting capacity." 144 Cong. Rec. 22,515 (daily ed. Sept. 28, 1998) (statement of Sen. Thurmond). Many of these acting officials served for years before the President submitted a nomination. *See* S. Rep. No. 105-250 at 3 (Acting Solicitor General served for over a year before

any nomination was submitted); 144 Cong. Rec. 22,515 (statement of Sen. Thurmond) (Acting Assistant Attorney General of the Criminal Division served for two and a half years before any nomination was submitted); *see also* 144 Cong. Rec. 22,508-22,509 (statement of Sen. Thompson) (Acting Director of Office of Thrift Supervision (OTS) "served for 4 years without a nomination for the position ever having been submitted to [the Senate]").

In at least one instance, an acting official served for years, even after the Senate *rejected* his nomination repeatedly. After the Senate refused to confirm Bill Lann Lee as Assistant Attorney General of the Civil Rights Division, the President installed him as the acting officer for the position. *See* The White House, Office of the Press Secretary, "Remarks by the President at Announcement of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights," 1997 WL 770918 (Dec. 15, 1997) (*Lee Press Release*). President Clinton explained, "I have done my best to work with the United States Senate in an entirely constitutional way," but "we had to get somebody into the Civil Rights Division." *Id.* at *4. "I can't wait for him to go to work." *Id.* at *5.[1]

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[1] President Clinton unsuccessfully nominated Lee twice more. *See* The White House, Office of the Press Secretary, "President Clinton Names Bill Lann Lee as Assistant Attorney General for Civil Rights at the Department of Justice," 2000 WL 1071925 (Aug. 3, 2000). Finally, on August 3, 2000—after Lee had performed duties in an "acting" capacity for more than two and a half years—President Clinton appointed him to the position under the Recess Appointments Clause. *Id.*

Lee's acting service flouted the Vacancies Act and threatened the Senate's advice-and-consent role in several respects. The Act's 120-day limit for acting service had expired long before Lee began his acting service. In fact, a different acting officer had already out-served that time limit by more than 60 days. *See CRS Validity Memo* 2. Moreover, because the Senate had rejected Lee for the permanent position, his appointment as acting officer contravened the Vacancies Act's restriction on acting service by failed nominees. *See* Pub. L. No. 100-398, § 7(b), 102 Stat. at 988. On top of these violations, Lee (a private-sector employee) was not eligible to serve as an acting officer at all until the Administration named him "first assistant" to the Assistant Attorney General—a decision made the morning that Lee began his acting service. *See CRS Validity Memo* 2. These combined problems exemplified the widespread disregard of the Vacancies Act, which allowed a President's ultimate choice for a PAS position to serve in a long-term acting capacity without the Senate's consent.

Finally, the D.C. Circuit's decision in *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998), made matters worse. Although the Acting Director of OTS had served improperly for four years, the court upheld his actions because a properly appointed officer subsequently ratified them. *See id.* at 205, 214. *Doolin* thus underscored that the Vacancies Act had become toothless. *See* S. Rep. No. 105-250 at 8.

4. Congress enacts the FVRA to reclaim its role under the Appointments Clause

By 1998, Congress was alarmed that long-term acting officials were running the Government without the Senate's advice and consent. *See generally Vacancies Act Hearing*. This scheme "obliterate[d]" the premise of the Appointments Clause, that only Senate-confirmed officials should carry out important government functions. S. Rep. No. 105-250 at 7. Congress enacted the FVRA to stop these Executive "runaround[s] of" the Appointments Clause. 144 Cong. Rec. 22,517 (statement of Sen. Byrd); *see* S. Rep. No. 105-250 at 5.

a. After "months" of thorough study, a bipartisan group of Senators proposed a comprehensive new framework for appointing temporary officials. 144 Cong. Rec. 22,512 (statement of Sen. Byrd).

The initial draft of the FVRA constrained the President's power to staff vacancies by extinguishing an acting officer's authority if a nomination was not submitted within 150 days of the vacancy. *See* S. 2176, 105th Cong., 2d Sess. 3, 7; S. Rep. No. 105-250 at 14. Congress encouraged the President to submit timely nominations by extending that time limit when a nomination was pending. *See* S. 2176 at 4; S. Rep. No. 105-250 at 14.

The initial statutory draft also allowed only first assistants and individuals already holding PAS positions to serve as acting officers. *See* S. 2176 at 2-3. And even first assistants became ineligible to serve as acting officers if the President nominated them for the permanent position (unless they had

served as the first assistant for at least 180 days before the vacancy arose). *See id.* at 3.

Finally, in contrast to the Vacancies Act, the proposed legislation imposed consequences for violating these requirements. It provided that actions taken in violation of the statute "shall have no force or effect" and "may not be ratified." *Id.* at 9-10. Together, these provisions were designed to "create an incentive for the President to submit a nomination," and to ensure that "constitutionally mandated procedures ... [are] satisfied before acting officials may serve in positions that require Senate confirmation." S. Rep. No. 105-250 at 8, 14.

b. A few Senators expressed concern that the proposed FVRA went too far in constraining the President. They said that the 150-day limit on acting service was "too rigid" in light of the increasingly lengthy confirmation process. *Id.* at 35-36 (minority views). They also stated that the pool of eligible acting officials should include senior agency employees. 144 Cong. Rec. 22,519 (statement of Sen. Glenn); *see* 144 Cong. Rec. 22,514 (statement of Sen. Levin). Finally, they advocated shortening the 180-day time-in-service requirement for first assistants serving as both the acting officer and the nominee. 144 Cong. Rec. 22,519-20 (statement of Sen. Glenn); *see also* S. Rep. No. 105-250 at 31 (additional views).

c. Congress revised the FVRA to account for these concerns—but, as with earlier vacancy laws, it did so in a manner that preserved the Senate's advice-and-consent prerogative. In its final enacted form, Section 3345(a)(1) sets forth a rule of automatic succession: When a vacancy occurs, "the first

assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(1). The President "may" override this automatic rule by "direct[ing]" either "a person who serves in [another PAS position]" within the Government, or a senior government employee (i.e., an employee who has worked for at least 90 days at a pay rate of GS-15 or higher) from the same agency, "to perform the functions and duties of the vacant office temporarily in an acting capacity." *Id.* § 3345(a)(2)-(3).[2]

In the course of expanding the pool of eligible acting officers to include the potentially thousands of GS-15 employees within an agency, Congress made other changes to avoid recreating the sort of problem that led to the FVRA in the first place, i.e., a loophole enabling the President to put his chosen replacement to work immediately and for a prolonged period without the Senate's approval. In particular, Congress revised Section 3345(b)(1) to impose additional restrictions on acting officers whom the President has nominated for permanent appointment. As noted, the initial draft bill prohibited newly appointed first assistants from serving as both the acting official and the nominee. *See* S. 2176 at 3.[3] In

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[2] In the context of certain Executive offices of a fixed term, the President also "may direct an officer who is nominated by the President for reappointment for an additional term to the same office ... without a break in service, to continue to serve in that office" while his nomination for reappointment is pending. 5 U.S.C. § 3345(c)(1).

[3] The unenacted language provided that a person whom the President has nominated for appointment "may not serve as an acting officer for an office under this section" if that person

the enacted law, Congress deleted language that restricted the application of Section 3345(b)(1) to first assistants.

Thus, Section 3345(b)(1) provides: "Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section" if the President nominates him for the vacant PAS office and, during the year preceding the vacancy, he either "did not serve in the position of first assistant" at all or "served in the position of first assistant" for less than 90 days. *Id.* § 3345(b)(1). In other words, despite Subsection (a)(1)'s automatic-succession rule, a nominee can serve as the acting officer only if he is an experienced first assistant. *See id.* Section 3345(b)(2) creates a further exception to the restriction on acting service by a nominee. It allows first assistants with less than 90 days of experience to serve as both the acting official and the permanent nominee if the first assistant position is itself a PAS position and "the Senate has approved the appointment of such person to such office." *Id.* § 3345(b)(2).

(continued...)

(1) "serves in the position of first assistant to such officer" on the date of the vacancy, and (2) has held that position for less than 180 of the past 365 days. S. 2176 at 3.

B. Proceedings Below

1. Lafe Solomon serves as Acting General Counsel of the NLRB in violation of the FVRA

This case arises from Lafe Solomon's service as Acting General Counsel of the NLRB.

Under the National Labor Relations Act (NLRA), the General Counsel of the NLRB must be appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 153(d). He has "final authority ... in respect of the investigation of charges and issuance of complaints" alleging unfair labor practices. *Id.*

In June 2010, Ronald Meisburg resigned as NLRB General Counsel. The President directed Mr. Solomon to serve as the Board's Acting General Counsel pursuant to Section 3345(a) of the FVRA. *See* Pet. App. 5a.[4] At that time, Mr. Solomon was not the first assistant to the General Counsel, and his prior position did not require Presidential appointment or Senate confirmation. Mr. Solomon did, however, satisfy the salary and experience requirements of the FVRA's senior government employee provision, 5 U.S.C. § 3345(a)(3), because he had been serving as the Director of the NLRB's Office

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[4] The President did not invoke the NLRA's alternative method for appointing a temporary Acting General Counsel, "perhaps because the FVRA allows an acting officer to serve for a longer period of time." Pet. App. 6a n.2 (citing 29 U.S.C. § 153(d)); *see* 5 U.S.C. § 3347(a)(1)(A) (FVRA does not override statutory provisions "expressly" authorizing the President to designate acting official); S. Rep. No. 105-250 at 16 (FVRA does not override appointment provision in NLRA).

of Representation Appeals for ten years. *See* Pet. App. 11a.

Six months later, on January 5, 2011, the President nominated Mr. Solomon to serve as NLRB General Counsel on a permanent basis. *See* Pet. App. 6a. The Senate did not act on that nomination, and it was returned to the President. *See id.* (citing 159 Cong. Rec. S17 (daily ed. Jan. 3, 2013)). The President resubmitted Mr. Solomon's nomination on May 24, 2013, but ultimately withdrew it and nominated Richard Griffin, who was confirmed by the Senate on October 29, 2013. *See id.* Mr. Solomon served as Acting General Counsel from June 21, 2010, to November 4, 2013. *Id.*

2. While serving in violation of the FVRA, Mr. Solomon issues an unfair labor practice complaint against Respondent

In January 2013, while Mr. Solomon was serving as the NLRB General Counsel on an acting basis, an unfair labor practice complaint was issued against Respondent SW General, Inc. *See* Pet. App. 7a. The complaint alleged that Respondent violated the NLRA by unilaterally discontinuing annual bonus payments to certain long-term employees. *See id.* (citing 29 U.S.C. § 158(a)(1), (5)); Pet. App. 40a. Respondent argued that it fulfilled its obligations to make such payments under the collective bargaining agreement, and that it had no duty to make additional payments after that agreement expired. *See* Pet. App. 62a-63a. An administrative law judge (ALJ) disagreed. *See* Pet. App. 104a.

Respondent filed exceptions to the ALJ's decision. *See* Pet. App. 7a. In addition to contesting the ALJ's legal and factual findings, Respondent argued that the complaint was invalid because Mr. Solomon was serving as Acting General Counsel in violation of the FVRA. *See id.* The NLRB adopted the ALJ's recommended order without addressing Respondent's FVRA challenge. *See id.*; *see also* Pet. App. 31a-37a.

3. The D.C. Circuit unanimously dismisses the complaint because Mr. Solomon lacked authority to issue it

A D.C. Circuit panel comprising Judges Henderson, Srinivasan, and Wilkins vacated the NLRB's order. *See* Pet. App. 1a-30a. The court unanimously agreed with Respondent that the complaint was unauthorized because Section 3345(b)(1) rendered Mr. Solomon "ineligible to serve as Acting General Counsel once the President nominated him to be General Counsel." Pet. App. 7a. Section 3345(b)(1), the court explained, "prohibits a person from being both the acting officer and the permanent nominee unless (1) he served as the first assistant to the office in question for at least 90 of the last 365 days or (2) he was confirmed by the Senate to be the first assistant." Pet. App. 11a (citing 5 U.S.C. § 3345(b)(1)-(2)).

The court held that the FVRA makes clear that Section 3345(b)(1)'s prohibition applies to "all acting officers," not just those who assume their position under Subsection (a)(1). *See* Pet. App. 11a, 20a. Subsection (b)(1) begins: "Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if [certain

criteria are met]." 5 U.S.C. § 3345(b)(1). The term "a person," the court explained, is "broad" and "covers the full spectrum of possible candidates for acting officer." Pet. App. 12a. "And the phrase 'this section' plainly refers to section 3345 in its entirety"; it is not limited to Subsection (a)(1). *Id.* "Thus, the plain language of subsection (b)(1) manifests that no person can serve as both the acting officer and the permanent nominee (unless one of the exceptions in subsections (b)(1)(A) or (b)(2) applies)." Pet. App. 13a.

The court rejected the Government's contrary interpretation, which "focus[ed]" on the phrase, "[n]otwithstanding subsection (a)(1)." *Id.* The word "notwithstanding" means "in spite of," not "for purposes of" or "with respect to." *Id.* The "notwithstanding" clause therefore does not *restrict* "the ultimate scope of subsection (b)(1)." Pet. App. 14a.

In the face of the FVRA's "plain language," the court found the Government's reliance on contradictory floor statements and other legislative history unpersuasive. Pet. App. 17a. The court also noted that the FVRA's references to the first assistant in Sections 3345(b)(1)(A)(i) and 3345(b)(2)(A) would be unnecessary if Section 3345(b)(1) applied only to first assistants. *See* Pet. App. 15a-16a; *infra* 30-32.

"Because Solomon was never a first assistant and the President nominated him to be General Counsel on January 5, 2011," the court held that he served in violation of the FVRA "from that date forward." Pet. App. 20a. After rejecting certain additional defenses by the Government, *see* Pet. App. 21a-22a, the court

dismissed the complaint and vacated the NLRB's order. Pet. App. 30a.

SUMMARY OF ARGUMENT

I. The text, structure, and purpose of the FVRA point to the same conclusion: Section 3345(b)(1)'s restriction applies to all acting officers.

Section 3345(b)(1) is clear and unambiguous: "[A] *person* may not serve as an acting officer for an office under *this section*" unless he can satisfy specific criteria. 5 U.S.C. § 3345(b)(1) (emphasis added). This language encompasses all acting officers. First assistants, PAS officials, and GS-15 agency employees are all "persons" serving under Section 3345. If Congress had intended to limit Section 3345(b)(1)'s requirement to first assistants, it could easily have said, "a first assistant serving under Subsection (a)(1)." Indeed, Congress was precise in its use of internal cross-references throughout the FVRA. And other provisions of the statute confirm that Congress knew how to refer to a subset of acting officers when it wanted to do so.

Section 3345(b)(1)'s introductory clause—"notwithstanding subsection (a)(1)"—underscores the broad application of the words that follow it. That clause makes clear that Subsection (b)(1)'s prohibition applies even when it conflicts with Subsection (a)(1)'s automatic-succession rule. But the "notwithstanding" clause does not mean that Subsection (b)(1) applies *only* to first assistants serving under Subsection (a)(1). Indeed, the word "notwithstanding" means "in spite of"—not "for purposes of" or "with respect to." Congress used the phrase "notwithstanding subsection (a)(1)" elsewhere

in Section 3345 according to this ordinary meaning—to override conflicting provisions, rather than to limit the words that follow. It plays the same role in Subsection (b)(1). Moreover, that reading avoids creating superfluity in the surrounding text.

Reading Section 3345(b)(1)'s prohibition to apply to all acting officers is consistent with the FVRA's purpose and history; it also comports with the background constitutional principle that Officers of the United States require Senate confirmation. In the years leading to the FVRA's enactment, Presidents from both parties had been directing their chosen replacements to serve as acting officers for prolonged periods without obtaining the Senate's approval. Congress enacted the FVRA to solve that problem. The FVRA does recognize the need for flexibility during a vacancy by allowing the President to choose from a broad pool of acting officials (first assistants, PAS officers, and senior agency employees) who may serve throughout the potentially lengthy process of confirming a permanent officeholder. But precisely because of this flexibility, Congress did not want the President's *chosen nominee* to get to work immediately under the guise of acting service. That would resurrect the very problems the FVRA was enacted to address.

II. The Government nevertheless claims that Section 3345(b)(1)'s broadly worded prohibition applies only to first assistants.

The Government construes the clause "notwithstanding subsection (a)(1)" to mean that Subsection 3345(b)(1)'s prohibition applies only "for purposes of" or "with respect to" first assistants

serving under Subsection (a)(1). But that is not what "notwithstanding" means. The Government cites no authority supporting its atextual reading of a term that Congress consistently uses according to its proper meaning, including elsewhere in Section 3345. Moreover, critical differences between Subsection (a)(1) and Subsections (a)(2)-(3) justify Congress's decision to single out Subsection (a)(1) in the "notwithstanding" clause. Subsection (a)(1) creates a self-executing rule: The first assistant "shall" serve as the acting officer when a vacancy arises. Subsection (b)(1) starkly conflicts, by saying that some first assistants "may not" do so. The "notwithstanding" clause resolves that conflict. By contrast, Subsection (b)(1) does not conflict with Subsections (a)(2)-(3) in the same way. The latter are permissive provisions that grant the President discretion, which Subsection (b)(1) then delineates. Congress frequently confers discretion in one subsection and cabins it in another. No "notwithstanding" clause is necessary to harmonize these provisions.

The Government next looks to the FVRA's history and purpose for support, but that background confirms Respondents' reading of Section 3345(b)(1). The sole piece of legislative history that even remotely supports the Government's view is a single sentence uttered on the Senate floor, which another sponsor of the FVRA quickly contradicted.

Finally, the Government claims that the Executive Branch has rewritten Section 3345(b)(1) by disregarding it for the past 18 years. That is not, of course, how statutes are amended. In any event, the Executive Branch's past reading of the FVRA is not

entitled to any deference. The Government relies heavily on conclusory statements that OLC and GAO issued without any analysis, but it appropriately does not suggest that those interpretations warrant *Chevron* deference. And while the Government claims that the Senate has acquiesced to its approach, it cites no evidence that the Senate was even aware that some acting officials served in violation of the FVRA while their nominations were pending, much less that Congress approved of the Executive Branch's interpretation of the statute.

ARGUMENT

I. SECTION 3345(b)(1)'S PROHIBITION APPLIES TO ALL ACTING OFFICERS

Section 3345(b)(1)'s prohibition on acting service by a permanent nominee applies to "a person" serving as an acting officer "under this section"—i.e., all acting officers serving under Section 3345. The introductory clause, "notwithstanding subsection (a)(1)," underscores the broad application of this language by making clear that it even overrides Section 3345(a)(1)'s conflicting automatic-succession rule.

This interpretation is consistent with the surrounding text, the legislative history, and background constitutional principles, all of which point to the same conclusion: Congress did not want the President's chosen nominee to begin performing the duties of a vacant PAS office before the Senate approved.

A. Section 3345(b)(1)'s Language Is Clear

1. As both the D.C. and Ninth Circuits explained, "[t]he first independent clause of subsection (b)(1) is the clearest indication of its overall scope." Pet. App.

12a; *see Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 558-59 (9th Cir. 2016). That clause states that "*a person* may not serve as an acting officer for an office under *this section*." 5 U.S.C. § 3345(b)(1) (emphasis added). The broad term "person" naturally includes "the full spectrum of possible candidates for acting officer." Pet. App. 12a; *Kitsap*, 816 F.3d at 558. "And the phrase 'this section' plainly refers to section 3345 in its entirety." Pet. App. 12a; *Kitsap*, 816 F.3d at 558. If Congress had intended Subsection (b)(1) to apply only to Subsection (a)(1), "it would have said 'first assistant' and 'that subsection' [or 'subsection (a)(1)'] instead of 'a person' and 'this section.'" Pet. App. 12a-13a; *see Kitsap*, 816 F.3d at 559.

Section 3345(b)(1)'s introductory, dependent clause—"notwithstanding subsection (a)(1)"—does not narrow the broad reach of the categorical words that follow it—"person" and "section." The "notwithstanding" clause "simply means that (b)(1)'s limitations control, even to the extent that (a)(1)'s automatic directive that first assistants 'shall' serve in an acting capacity may conflict with those limitations." *Kitsap*, 816 F.3d at 559; *see* Pet. App. 13a-14a. But "[n]othing about this textual construction indicates that (b)(1) applies *only* to (a)(1)." *Kitsap*, 816 F.3d at 559. And the other language in Section 3345(b)(1) clearly encompasses all acting officials.

2. Sound authority supports this analysis of the FVRA. Courts interpret words according to "their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014). And

the ordinary meaning of the words Congress used in Section 3345(b)(1) includes all acting officers.

a. The term "a person" has a broad and inclusive scope. The Dictionary Act defines "person" to include "individuals." 1 U.S.C. § 1. Dictionaries similarly define "person" as "a human being." *E.g.*, Black's Law Dictionary 1142 (6th ed. 1990). And this Court likewise has recognized "the all-inclusive nature of the term 'person.'" *Jefferson Cnty. Pharmaceutical Ass'n, Inc. v. Abbott Labs.*, 460 U.S. 150, 156 (1983); *see also Pfizer v. Gov't of India*, 434 U.S. 308, 312 (1978). Finally, because the modifier "a" has a "generalizing force," Black's Law Dictionary 1477, the phrase "a person" is all-encompassing. *Cf. Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 783 n.12 (2000) (changing "modifier 'a' to 'any'" does not alter meaning of "person").

Applying these principles, this Court held that Title IX of the Education Amendments of 1972, which provides that "[n]o person" shall be discriminated against based on gender, 20 U.S.C. § 1681(a), protects not only students, but also employees of educational institutions. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 519 (1982). "[I]f it had wished to restrict the scope of [Title IX]," the Court explained, "Congress easily could have substituted 'student' or 'beneficiary' for the word 'person.'" *Id.* at 521. Similarly, the en banc Tenth Circuit rejected the argument that "a government employee who obtains information about fraud in the scope of his or her employment and who is required to report that fraud is not a 'person' entitled to bring a civil action under [the False Claims Act]." *United States ex rel. Holmes*

v. Consumer Ins. Grp., 318 F.3d 1199, 1208-11 (10th Cir. 2003) (en banc).

The same reasoning applies here. First assistants, PAS officers, and GS-15 employees are all "persons" within the meaning of Section 3345(b)(1). Indeed, Section 3346(a)—which, much like Section 3345(b)(1), refers to a "person serving as an acting officer ... under section 3345"—indisputably applies to all categories of acting officers. 5 U.S.C. § 3346(a); *see also id.* § 3346(b)(1), (b)(2); *id.* § 3349(a)(2). If Congress had intended to refer only to first assistants in Section 3345(b)(1), it would have been far more natural to substitute "first assistant" for "person."

b. Congress's use of "this section" likewise confirms that the "persons" referred to in Section 3345(b)(1) include all acting officers. It is well established that the phrase "this section" refers to the entire section in which it appears. In subdividing statutory sections, Congress normally adheres to a hierarchical scheme. *See* L. Filson, *The Legislative Drafter's Desk Reference* 222 (1992). Drafting manuals prepared by the legislative counsel's office in the House and the Senate provide that sections should be subdivided into "subsections (starting with (a))," "paragraphs (starting with (1))," "subparagraphs (starting with (A))," and "clauses (starting with (i))." *House Legislative Counsel's Manual on Drafting Style*, HLC No. 104-1, p. 24 (1995); *see* Senate Office of the Legislative Counsel, *Legislative Drafting Manual* 10 (1997).

Courts interpret statutes in accordance with this hierarchical scheme. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60-62 (2004) (approvingly

citing House and Senate drafting manuals and distinguishing between Congress's use of "subparagraph" and "clause"); *Perry v. First Nat'l Bank*, 459 F.3d 816, 820 (7th Cir. 2006) (distinguishing between Congress's use of "section" and "subsection"); *United States v. Mills*, 140 F.3d 630, 633 (6th Cir. 1998) (distinguishing between Congress's use of "section" and "subparagraph"); *Estate of Flanigan v. Comm'r*, 743 F.2d 1526, 1530 (11th Cir. 1984) (distinguishing between Congress's use of "section" and "paragraph"). And because this Court is "generally reluctant to give the same words a different meaning when construing statutes," it is particularly important to give hierarchical terms their ordinary meaning when Congress uses them repeatedly throughout a statute. *Bank of America, N.A. v. Caulkett*, 135 S. Ct. 1995, 2001 (2015); *see Perry*, 459 F.3d at 820-21.

These principles confirm that Section 3345(b)(1) applies to all officers acting under Section 3345—not just those acting under Subsection (a)(1). "Throughout the FVRA, Congress was precise in its use of internal cross-references." Pet. App. 12a; *e.g.*, 5 U.S.C. § 3345(a)(3)(B) ("subparagraph (A)"); *id.* § 3345(b)(2) ("Paragraph 1"); *id.* § 3346(a)(2) ("subsection (b)"); *id.* § 3347(a) ("Sections 3345 and 3346"). Congress knew how "to refer to something less than a whole section" when it wanted to. *Kitsap*, 816 F.3d at 559. Conversely, Congress's use of the phrase "this section" elsewhere in the FVRA plainly refers to the entire section in which it appears. *See, e.g.*, 5 U.S.C. § 3348(a), (e). If Congress intended for Subsection (b)(1) to apply only to acting officers serving under Subsection (a)(1), it would have

referred to a person (or, better yet, a first assistant) serving "under Subsection (a)(1)"; it would not have said "this section," a term that, both elsewhere in the FVRA and as a matter of established drafting practice, has a broader meaning. *Kitsap*, 816 F.3d at 559.

c. The introductory phrase, "notwithstanding subsection (a)(1)," underscores the breadth of the words that follow it. That phrase makes clear that Subsection (b)(1) applies even when another rule directly conflicts with its prohibition. It does not limit the scope of "a person" or "this section," nor does it mean that Subsection (b)(1) applies only "for purposes of" or "with respect to" Subsection (a)(1).

The ordinary meaning of "notwithstanding" is "in spite of," or "without prevention or obstruction from or by." Webster's Third New International Dictionary 1545 (1986); *see* Oxford English Dictionary 556 (2d ed. 1989) ("[i]n spite of"); Black's Law Dictionary (10th ed. 2014) (same); *see also* The Chicago Manual of Style § 5.220 (16th ed. 2010). Thus, "a 'notwithstanding clause' clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override" any specified conflicting provisions. *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993); *see also, e.g.*, *Deutsche Bank Nat'l Trust Co. v. Tucker*, 621 F.3d 460 (6th Cir. 2010); Antonin Scalia & Bryan A. Garner, *Reading the Law: The Interpretation of Legal Texts* 126-27 (2012).

Consider, for example, Congress's use of "notwithstanding" in Subsection (a):

> (1): "[T]he first assistant to the [vacant] office ... shall perform the functions and duties of the office temporarily in an acting capacity[.]" 5 U.S.C. § 3345(a)(1).
>
> (2): "[N]otwithstanding paragraph (1), the President (and only the President) may direct a [PAS officer] to perform the functions and duties of the vacant office temporarily in an acting capacity[.]" *Id.* § 3345(a)(2).

Subsection (a)(1)'s self-executing rule directly conflicts with Subsection (a)(2). The "notwithstanding" clause resolves this conflict by making clear that Subsection (a)(2) applies *in spite of* Subsection (a)(1)'s mandate. But Subsection (a)(2) does not apply only "for purposes of" or "with respect to" Subsection (a)(1); to the contrary, it applies even when Subsection (a)(1) does not apply at all. For example, when there is no first assistant position in the first place (as is the case for many of the positions identified in the Government's appendix), an acting officer may still serve pursuant to Subsection (a)(2). *See, e.g.*, Pet. Br. App. 16a-17a nn.23-24, 25a-26a nn.37-40, 64a-65a nn.90-91. The "notwithstanding" clauses in Subsections (a)(3) and (c)(1) function the same way. *See* 5 U.S.C. § 3345(a)(3), (c)(1).

The "notwithstanding" clause also plays the same role in Section 3345(b)(1). When the President nominates a short-serving, non-PAS first assistant to the permanent position, Section 3345(a)(1) says that such person "shall" automatically serve as the acting officer; Section 3345(b)(1) says the same person "may not" serve as the acting officer. *Id.* § 3345(a)(1), (b)(1). The "notwithstanding" clause resolves this

conflict by making clear that Section 3345(b)(1)'s restrictions override Section 3345(a)(1)'s mandate. But as with Congress's other usages of the phrase, it does not mean that Section 3345(b)(1) applies *only* where Section 3345(a)(1) applies. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("[I]dentical words used in different parts of the same act are intended to have the same meaning."); *see also infra* 37-44 (responding to Government's attempt to rewrite Section 3345(b)(1) using the "notwithstanding" clause).

B. Interpreting Section 3345 To Apply To All Acting Officers Avoids Superfluity In The Surrounding Text

"It is ... a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). As both the D.C. and Ninth Circuits recognized, construing Section 3345(b)(1) to apply to first assistants, PAS officers, and senior government employees avoids superfluity in the surrounding text. *See* Pet. App. 15a; *Kitsap*, 816 F.3d at 560.

First, interpreting Section 3345(b) to apply to all acting officers avoids rendering Subsection (b)(2) entirely superfluous. Subsection (b)(2) creates an exception to Subsection (b)(1)'s prohibition by allowing first assistants with less than 90 days of experience to serve as both the acting officer and the permanent nominee if the first assistant position is itself a PAS position and "the Senate has approved the appointment of such person to such office." 5 U.S.C. § 3345(b)(2). There would be no need to carve

out this exception if Section 3345(b)(1)'s general prohibition applied only to first assistants serving pursuant to Subsection (a)(1). The President could simply direct a nominee who is a Senate-confirmed first assistant to serve as the acting officer pursuant to Subsection (a)(2) (which, according to the Government, is not constrained by Subsection (b)(1)). *See id.* § 3345(a)(2).

In fact, Congress added Subsection (b)(2)'s language only after expanding Subsection (b)(1) to reach all acting officers. The initial draft bill—which included language "manifestly appl[ying] [Section 3345(b)(1)] to first assistants only," Pet. App. 19a—did not include Subsection (b)(2) at all. *See* S. 2176 at 3. It did not need to: Until Congress expanded Section 3345(b)(1)'s reach, Senate-confirmed first assistants could serve as acting officers under Subsection (a)(2) even if they were also the permanent nominee.

Second, the D.C. and Ninth Circuits' interpretation of Section 3345(b)(1) also gives meaning to the exception in Section 3345(b)(2)(A) for a Senate-confirmed "person [who] is serving as the first assistant to the office of an officer described under subsection (a)." If Section 3345(b)(1)'s reference to "a person" included only first assistants, there would be no need for Subsection (b)(2)(A) to state the requirement that a person be serving as a first assistant: "[T]he current first assistant—whether he became first assistant before or after the vacancy—is *necessarily* serving as a first assistant." Pet. App. 16a. Indeed, by equating "person" with "first assistant," the Government reads Subsection (b)(2)(A) to apply to "a first assistant" who "is serving as the

first assistant." The Government claims that Congress sought to "state with completeness the criteria for application of Subsection (b)(2)." Pet. Br. 35. But that is no explanation because Congress did *not* restate Subsection (b)(1)'s other central requirement: that the acting official also have been nominated for the permanent position. *See* 5 U.S.C. § 3345(b)(1)(B).

Finally, interpreting Section 3345(b)(1) to apply only to first assistants could render the condition in Subsection (b)(1)(A)(i)—that the person "'did not serve in the position of first assistant to the office'" in the prior 365 days—"inoperative" as well. Pet. App. 16a (quoting 5 U.S.C. § 3345(b)(1)(A)(i)). Although neither court needed to reach the question, both the D.C. and Ninth Circuits noted that "subsection (a)(1) may refer [only] to the person who is serving as first assistant *when the vacancy occurs*." Pet. App. 15a; *see Kitsap*, 816 F.3d at 560. If this interpretation is correct—a question on which the Government has flip-flopped[5]—Subsection (b)(1)(A)(i) could never be satisfied because the first assistant at the time of the vacancy "*necessarily* served as the first assistant in the previous year." Pet. App. 16a; *see Kitsap*, 816 F.3d at 560. By contrast, interpreting Section

[5] In the same memorandum on which the Government relies for its interpretation of Section 3345(b)(1), OLC concluded that "the better understanding is that you must be the first assistant when the vacancy occurs in order to be the acting officer [under Section 3345(a)(1)]." Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 63-64 (1999). OLC later determined that its "initial understanding was erroneous" and reversed course. Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 179 (2001).

3345(b)(1) to reach all acting officers avoids superfluity because "many PAS officers (subsection (a)(2)) and senior agency employees (subsection (a)(3)) will not have served as the first assistant in the prior year." Pet. App. 16a; *see Kitsap*, 816 F.3d at 560.

C. The FVRA's History And Purpose Further Support Respondent's Interpretation Of Section 3345(b)(1)

The history and purpose of the FVRA further confirm that Section 3345(b)(1) applies to all acting officers.

1. Congress's primary objective in enacting the FVRA was to reclaim the Senate's role under the Appointments Clause. *See supra* 11. In the years leading up to the FVRA's enactment, Presidents repeatedly used acting service as a way to put their ultimate choice for a vacant position to work, immediately and for a prolonged period, without the Senate's approval. *See supra* 8-10. This threatened to "obliterate[] the constitutional requirement that the officer serve only after the Senate confirms the nominee." S. Rep. No. 105-250 at 7.

This prolonged service often occurred because the President installed his chosen replacement as an acting officer without ever submitting a nomination at all. *See supra* 8-9. But not always. *See supra* 9-10. And whether or not the President has publicly nominated his chosen replacement, the core problem with that individual's acting service remains the same. In either case, the President has installed his chosen officeholder to perform the duties of a PAS office without obtaining the Senate's approval.

The FVRA addresses these concerns by requiring the President to identify his chosen replacement promptly, *see* 5 U.S.C. § 3346(a), and by generally preventing that individual from starting work in his proposed new role without first obtaining the Senate's advice and consent, *see id.* § 3345(b)(1).

At the same time, the FVRA ensures that the government can continue to run smoothly until the Senate approves a permanent officeholder. Congress allowed the President to choose from a specified pool of competent caretakers—first assistants, PAS officers, and senior agency employees—to serve as acting officials throughout the potentially lengthy confirmation process. *See id.* §§ 3345(a), 3346. And when it comes to the acting officers *most* competent to keep the agency running—experienced or Senate-confirmed first assistants—the FVRA even creates an exception to the bar on acting service by nominees. *See id.* § 3345(b)(1)(A), (b)(2). But this exception is appropriately limited. Congress did not want to recreate the core problem that led to the FVRA in the first place, by allowing acting service to become an avenue for the President to put his chosen replacement to work before the Senate approves.

2. An example illustrates why interpreting Section 3345(b)(1) to prohibit acting service by nominees serving under Subsections (a)(2) and (a)(3) advances the FVRA's objectives.

Because the FVRA allows an acting officer to serve throughout the time a nomination is pending, the President's chosen replacement could potentially serve for years, if the President selects that person from the hundreds of PAS officials in unrelated

agencies, or the potentially thousands of GS-15 employees in the same agency. After designating his chosen replacement to begin acting service immediately, the President could wait 210 days to name that person as a nominee. *See* § 5 U.S.C. § 3346(a)(1). The acting officer could continue to serve while his nomination is pending (as long as two years) and, if the nomination fails, for 210 more days. *See id.* § 3346(a)(2), (b)(1). On the 210th day, the President could renominate his same chosen replacement, who could continue to serve throughout that second confirmation process—and if the second nomination fails, for 210 days after that. *Id.* § 3346(b)(1)-(2).

In other words, the President need only select his chosen replacement from the vast pool of PAS officers or GS-15 employees, and he can then immediately install that person for prolonged acting service regardless of the Senate's views. Even if the Senate *rejects* that person for the permanent position (and even if it does so twice), the President's ultimate choice may still serve as the acting officer for 630 days on top of however long the Senate takes to consider his nominations—a period that could easily equal the President's entire four-year term. Not even the Vacancies Act would have allowed that. *See* Pub. L. No. 100-398, § 7(b), 102 Stat. at 988 (imposing restrictions on acting service by nominees the Senate had rejected). Certainly the FVRA does not.

Interpreting Section 3345(b)(1) to apply to all acting officers closes this potential loophole for circumventing the Senate's advice and consent. Once the President identifies and nominates his chosen replacement—which Section 3346(a)(1) requires him

to do promptly—that person (aside from the very narrow exception in Section 3345(b)) cannot perform the duties of the vacant office until the Senate confirms him.

D. Background Constitutional Principles Favor Interpreting Section 3345(b)(1) To Apply To All Acting Officers

Finally, interpreting Section 3345(b)(1) to apply to all acting officials is consistent with the background constitutional principle that "Officers of the United States" require the Senate's advice and consent. U.S. Const., art. II, § 2, cl. 2.

1. "[T]he Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659. The Framers required "the Advice and Consent of the Senate" to ensure that the Executive would be "accountable to political force and the will of the people" when making appointments. *Freytag*, 501 U.S. at 884. The Appointments Clause accordingly is "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). However, as with other checks and balances, "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." *Freytag*, 501 U.S. at 880.

The Constitution's structural protections frequently guide this Court in interpreting statutes. *Kucana v. Holder*, for example, involved a provision in the Illegal Immigration Reform and Immigrant

Responsibility Act depriving courts of jurisdiction to review certain discretionary actions by the Attorney General. 558 U.S. 233, 237 (2010). The Court construed this provision narrowly, stressing that "[s]eparation-of-powers concerns ... caution us against reading legislation, absent a clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Id.*; *see id.* at 252.

Other cases likewise recognize the Constitution's various structural safeguards as a "background principle[] of construction." *Bond v. United States*, 134 S. Ct. 2077, 2088-90 (2014) (construing ambiguous statute in light of "basic principles of federalism embodied in the Constitution"); *see, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (interpreting term "agency" in Administrative Procedure Act in light of "the separation of powers and the unique constitutional position of the President"); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66-67 (1989) (rejecting statutory interpretation that would disregard traditional balance between the States and the Federal Government).

2. The same principles support construing Section 3345(b)(1) to apply to all acting officers. By allowing temporary officials to perform important government functions that are otherwise reserved to Senate-confirmed "Officers of the United States," the FVRA departs from the constitutional "norm." *See Noel Canning*, 134 S. Ct. at 2558. That departure should be construed narrowly. *See Kucana*, 558 U.S. at 237; *Bond*, 134 S. Ct. at 2088-90; *Franklin*, 505 U.S at 800-01; *Will*, 491 U.S. at 66-67. If Section 3345(b)(1) applied only to first assistants, any

nominee from among the hundreds of PAS officers in unrelated agencies, or the potentially thousands of GS-15 employees within an agency, would be able to begin performing those functions immediately under the guise of acting service. By contrast, if Section 3345(b)(1) applies to all acting officials, only one nominee—the long-serving or Senate-confirmed first assistant to the vacant office—can do so. Separation-of-powers concerns favor the latter interpretation, lest Section 3345(b)(1) "obliterate[] the constitutional requirement that the officer serve only after the Senate confirms the nominee." S. Rep. No. 105-250 at 7.

II. THE GOVERNMENT'S CONTRARY ARGUMENTS ARE UNAVAILING

The Government nevertheless attempts to rewrite Section 3345(b)(1)'s unambiguous text. All relevant authority refutes the Government's assertion that the introductory clause "notwithstanding subsection (a)(1)" limits the broad words that follow it. The Government's interpretation likewise finds no support in the FVRA's history and purpose. Nor is the Government entitled to rewrite the FVRA based on the Executive Branch's previous disregard for the statutory text.

A. The "Notwithstanding" Clause Does Not Restrict The Broad Language That Follows It

The Government's sole textual argument is that "notwithstanding subsection (a)(1)" means that Section 3345(b)(1) applies *only* to Subsection (a)(1). According to the Government, Congress's failure to include Subsections (a)(2) and (a)(3) in the

"notwithstanding" clause indicates that it did not intend for Section 3345(b)(1) to apply to those provisions at all. This argument falters at every step.

1. "Notwithstanding" clauses do not restrict a provision's scope. Instead, they emphasize a provision's breadth by making clear that it applies even when another rule directly conflicts. *See supra* 27-28. That is how "notwithstanding" clauses are used elsewhere in Section 3345. *See id.* By ascribing a limiting function to "notwithstanding subsection (a)(1)," it is the Government—not Respondent—that creates inconsistency in the FVRA's use of "notwithstanding." *See* Pet. Br. 30.

The Government cites no authority for the notion that a "notwithstanding" clause narrows a provision's scope so that it applies only where a specified conflicting rule would otherwise govern. Numerous cases repudiate that view. For example, the Negotiated Rates Act, 49 U.S.C. § 10701(f), allows a motor carrier's bankrupt estate to recover amounts that the carrier unlawfully undercharged shippers. *See In the Matter of Lifschultz Fast Freight Corp.*, 63 F.3d 621, 623 (7th Cir. 1995). Section 10701(f)(9) provides: "Notwithstanding paragraphs (2), (3), and (4)," which set forth options for some shippers to settle the claims against them, the bankruptcy estate may not recover from small businesses. 49 U.S.C. § 10701(f)(9). Several courts have rejected the argument that "the bar created by [Section 10701(f)(9)] applies *only* where the settlement options listed in [paragraphs (2), (3), and (4)] would apply." *Lifschultz*, 63 F.3d at 631; *see, e.g.*, *In re Bulldog Trucking, Inc.*, 66 F.3d 1390, 1397 (4th Cir. 1995); *In re Jones Trucking Lines, Inc.*, 57 F.3d 642, 648 (8th

Cir. 1995). Rather, Section 10701(f)(9) bars recovery against even those small businesses that are not eligible to settle the claims against them under paragraphs (2), (3), and (4). *See Lifschultz*, 63 F.3d at 631.

Similarly, Section 1322(e) of the Bankruptcy Code, 11 U.S.C. § 1322(e), requires a Chapter 13 debtor to include in his plan the interest, costs, and fees imposed by the underlying debt agreement, "notwithstanding" a separate provision allowing only oversecured creditors to recover such amounts. Relying on the "notwithstanding" clause, the debtor in *Deutsche Bank National Trust Co. v. Tucker* argued that Section 1322(e)'s requirement applied only to oversecured creditors and not to under- or unsecured creditors. *See* 621 F.3d at 462. The Sixth Circuit disagreed, explaining that the debtor's argument "conflicts with the plain language of [Section 1322(e)]," which applies whether or not a creditor is oversecured. *Id.* at 463, 465.

Here, Section 3345(b)(1)'s "notwithstanding" clause makes clear that Section 3345(b)(1) overrides Section 3345(a)(1)—but it does not mean "that (b)(1) applies *only* to (a)(1)." *Kitsap*, 816 F.3d at 559. Had Congress intended that result, it would have introduced Section 3345(b)(1)'s broad independent clause by saying "for purposes of" or "with respect to" Subsection (a)(1). Such limiting dependent clauses have a meaning different from "notwithstanding." Pet. App. 13a. Indeed, Congress's use of the phrase "[f]or purposes of" elsewhere in Section 3345 confirms that "it knew how to use limiting language when it wanted to." Pet. App. 15a (citing 5 U.S.C.

§ 3345(c)(2)); *see also* 5 U.S.C. § 3346(a)(2) ("subject to subsection (b)").

2. Invoking the canon *expressio unius exclusion alterius*, the Government nevertheless insists that Congress's decision to specify "notwithstanding subsection (a)(1)" indicates that Congress did not intend for Section (b)(1) to apply to Subsections (a)(2) and (a)(3). *See* Pet. Br. 28. But as the Government's authorities confirm, that canon "depends on identifving a series of two or more things that should be understood to go hand in hand." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003); *see also, e.g., Lindh v. Murphy*, 521 U.S. 320, 329 (1997). It is inapposite here, where critical differences between Subsection (a)(1) and Subsections (a)(2)-(3) readily explain Congress's decision to single out Subsection (a)(1) in the "notwithstanding" clause.

Subsection (a)(1) sets forth a mandatory, self-executing rule. When a vacancy arises, the first assistant automatically becomes the acting officer. This rule creates a stark conflict with Section 3345(b)(1). When the President nominates a short-serving, non-PAS first assistant to the permanent position, that person is already serving as the acting officer because Subsection (a)(1) says that he "shall" do so; Subsection (b)(1) says he "may not." 5 U.S.C. § 3345(a)(1), (b)(1). Far from being superfluous (*see* Pet. Br. 37), Section 3345(b)(1)'s "notwithstanding" clause resolves this conflict by making clear that Section 3345(b)(1)'s restrictions override Section 3345(a)(1)'s mandate.

By contrast, there is no conflict between Section 3345(b)(1) and Subsections (a)(2) and (a)(3) that

warrants including them in the "notwithstanding" clause. Subsections (a)(2) and (a)(3) are not self-executing rules that trigger immediate results; they are permissive provisions that grant the President discretion. That discretion is not boundless, and Section 3345(b)(1) delineates it. Section 3345(b)(1) notifies the President from the outset that his decision to nominate certain individuals for the permanent position will disqualify those individuals from acting service. But that does not create a conflict with Subsections (a)(2) or (a)(3). After all, no single subsection, paragraph, or subparagraph, standing alone, provides the complete picture of the President's discretion to designate acting officers; Section 3345, as a whole, does so.

Section 3345 is not unusual in this regard. Congress frequently confers broad discretion in one subsection and then limits it in another. In such circumstances, a "notwithstanding" clause is unnecessary; the two provisions are naturally read together and harmonized.

For example, under 14 U.S.C. § 211(a)(1), "[t]he President may appoint permanent commissioned officers in the Regular Coast Guard in grades appropriate to their qualification, experience, and length of service, as the needs of the Coast Guard may require, from among" specified categories of individuals. While that subsection grants the President discretion to make appointments, Subsection (b) limits it—without the use of a "notwithstanding" clause. It states that "[n]o person shall be appointed a commissioned officer under this section until [he satisfies criteria established by the Secretary]." *Id.* § 211(b).

Similarly, under 10 U.S.C. § 408(a), "[t]he Secretary of Defense may provide assistance to *any* foreign nation to assist the Department of Defense with recovery of and accounting for missing United States Government personnel." (emphasis added). Subsection (c) limits the Secretary's discretion—again, without using a "notwithstanding" clause—by stating that "[a]ssistance may *not* be provided under this section to any foreign nation unless the Secretary of State specifically approves the provision of such assistance." *Id.* § 408(c) (emphasis added); *see also* 10 U.S.C. § 401(a)(1), (b) (similar); *id.* § 407(a)(1), (b)(1) (similar).

Likewise, the Administrator of FEMA "may pay a bonus to an individual in order to recruit the individual for a position within the Agency that would otherwise be difficult to fill in the absence of such a bonus." 5 U.S.C. § 10104(a). Subsequent subsections constrain that discretion by prohibiting the payment of a bonus to certain individuals, *id.* § 10104(d); conditioning its payment, *id.* § 10104(c); and capping its amount, *id.* § 10104(b)(1)—all without the use of a "notwithstanding" clause. Many other statutes follow a similar pattern. *See, e.g.*, 10 U.S.C. § 14703(a), (b); 14 U.S.C. § 500(a), (b); 42 U.S.C. § 8814(a), (b)(1); *id.* § 8832(a), (b)(1)(A), (c).

The Government acknowledges that the operation of Subsections (a)(2) and (a)(3) "is not automatic," but claims that, once the President exercises his discretion under them, "those subsections are just as categorical as Subsection (a)(1) in directing the specified official to perform the office's functions and duties." Pet. Br. 32. This argument incorrectly presumes that the President has unfettered

discretion under Subsections (a)(2) and (a)(3). As explained above, however, the President's discretion to appoint someone other than the first assistant as an acting official has to be understood in light of Section 3345 as a whole. Subsections (a)(2) and (a)(3) are no more freestanding grants of discretion than the provisions in other statutes described above, which must be read in light of adjacent limitations.

The Government's argument also assumes that the President always designates an individual to act under Subsections (a)(2) or (a)(3) *before* nominating that person for the permanent position. That is wrong, and only highlights another way in which Subsections (a)(2) and (a)(3) differ from Subsection (a)(1). Subsection (a)(1)'s self-executing rule means that the first assistant will serve as the acting officer before the President can nominate anyone. By contrast, the Government's own appendix confirms that the President routinely directs PAS officers and GS-15 employees to serve as acting officers *after* nominating them for the permanent position. *See* Pet. Br. App. A (nearly one-third of nominees were designated as the acting officer after or on the same day as their nomination). In other words, the President often chooses a nominee first and an acting officer second. Section 3345(b)(1) makes clear that the first decision may affect his discretion regarding the second. Again, that is not a conflict; it is simply a boundary on discretion.

In sum, given that Subsection (a)(1) *alone* creates a true conflict with Section 3345(b)(1), it makes sense that Congress included that provision—and no others—in the "notwithstanding" clause. It is therefore no surprise that Congress chose not to use

the "common formulation" "notwithstanding any other provision of law." Pet. Br. 31. Indeed, in addition to being unnecessary, that broad formulation would have risked overriding alternative vacancy-filling mechanisms that the FVRA expressly preserves. *See* 5 U.S.C. § 3347(a)(1)(A); S. Rep. No. 105-250 at 16-17; *see also* Tobias A. Dorsey, *Legislative Drafter's Deskbook: A Practical Guide* 256 (2006) (Broadly worded "notwithstanding" clauses "might end up disregarding too many laws or too few[.]").

3. Nothing else in Section 3345 supports the Government's interpretation of Section 3345(b)(1).

First, the Government argues that the term "a person" includes first assistants serving under Subsection (a)(1). *See* Pet. Br. 33-34. But that is no reason to read Subsection 3345(b)(1) to apply only to first assistants. PAS officials are people, too. So are GS-15 employees. In fact, Congress used the word "person" throughout the FVRA to refer to all three types of acting officials. *See, e.g.*, 5 U.S.C. § 3346(a), (b)(1), (b)(2); *id.* § 3349(a)(2).

When Congress wanted to refer to only a subset of acting officials, it made that clear by including unmistakable qualifying language. *See, e.g.*, *id.* § 3345 (a)(2) ("a person who serves in [a PAS position]"). The Government sees such qualifying language in Section 3345(b)(1)'s requirement that a nominee serve as the first assistant for at least 90 days in the year preceding the vacancy. *See* Pet. Br. 33. But the fact that this requirement "would very rarely *be satisfied* by a person not serving as first

assistant," *id.* (emphasis added), says nothing about who is *subject to* the requirement in the first place.

Second, the Government claims that the phrases "a person" and "this section" should be given the same meaning that they had in the initial draft bill, which applied only to first assistants. Pet. Br. 34. But Congress deleted the language limiting the unenacted draft of Section 3345(b)(1) to first assistants, replacing it instead with language that encompasses all categories of acting officials. *See supra* 13-14. That deletion of limiting language only undermines the Government's reading of the statute that Congress actually enacted. *See Doe v. Chao*, 540 U.S. 614, 623 (2004).

Finally, interpreting Section 3345(b)(1) to apply to all acting officers does not create a conflict with Subsection (c)(1). *See* AFL-CIO Amicus Br. 12-13. Subsection (c)(1), which addresses certain term-limited PAS positions, extends an existing officeholder's term by allowing him "to continue to serve in that office," "without a break in service," while his nomination for an additional term is pending. 5 U.S.C. § 3345(c)(1). That continued service is unlike the acting service described in Subsection (a), by individuals who "perform the functions and duties of the [vacant] office temporarily in an acting capacity." *Id.* § 3345(a)(1)-(3). Section 3345(b)(1) accordingly does not apply to individuals serving under Subsection (c)(1) at all. And even if it did, Subsection (c)(1)'s narrow permission and Subsection (b)(1)'s general prohibition can easily be harmonized. *Cf. RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) ("It is a commonplace of statutory construction that the

specific governs the general."). By contrast, Subsection (a)(1)'s self-executing rule creates a stark conflict with Subsection (c)(1)'s discretionary provision. *See supra* 27-28.

* * *

If Congress had wanted to apply Section 3345(b)(1)'s prohibition to first assistants only, it had numerous ways of doing so. Congress could have said, "a first assistant may not serve as an acting officer for an office under Subsection (a)(1)." Or it could have begun Section 3345(b)(1) with the phrase "for purposes of Subsection (a)(1)." It even could have included Section 3345(b)(1)'s prohibition in Subsection (a)(1) (just as it included restrictions specific to agency employees in Subsection (a)(3)). What Congress would *not* have done is to specify that a broad prohibition applies "notwithstanding" Subsection (a)(1). That phrase cannot bear the weight that the Government ascribes to it.

B. The Government's Caricatured Account Of The FVRA's History And Purpose Does Not Warrant Departing From Section 3345(b)(1)'s Clear Text

The Government next looks to the FVRA's purpose and history to overcome Section 3345(b)(1)'s clear language. But that background supports Respondent's interpretation. *See supra* 32-35. And even if it did not, "the most formidable argument concerning the statute's purposes could not overcome" its unambiguous text. *Kloeckner v. Solis*, 133 S. Ct. 596, 607 n.4 (2012). The Government's evidence of legislative intent is "anything but" formidable. Pet. App. 17a.

1. The Government first claims that interpreting Section 3345(b)(1) to apply to all acting officers is at odds with "the FVRA's objective of providing the President with a measure of added flexibility in acting designations." Pet. Br. 39. But flexibility was not the FVRA's primary objective—in fact, it was just the opposite. In response to decades of Presidential circumvention of the Senate's advice-and-consent role, Congress sought to *constrain* the President's ability to staff vacancies with his chosen replacement without obtaining the Senate's approval. *See supra* 8-10, 32-33. To the extent a few Senators were concerned about flexibility, it was largely because they believed that "[Congress's] understandable desire to protect the Senate's constitutional prerogatives," as reflected in the initial draft of the FVRA, went too far. S. Rep. 105-250 at 30 (additional views); *see supra* 12.

Moreover, flexibility was not even the only driving force behind the changes that Congress made to the initial draft of Section 3345(b)(1). *See supra* 12-14, 32-34. The Government claims that the revisions to Section 3345(b)(1) were intended solely to "reduce[] from 180 to 90 days the time-in-service requirement ... for first assistants who are also nominees." Pet. Br. 46. But if that were so, Congress would have simply replaced "180 days" with "90 days," without making substantial other changes. Indeed, Congress did just that in Section 3346. *Compare* S. 2176 at 3-4 *with* 5 U.S.C. § 3346. The Government offers no explanation for Congress's additional changes to Section 3345(b)—including its elimination of language limiting Subsection (b)(1) to first assistants, and its addition of a provision (Subsection

(b)(2)) that would be unnecessary if Subsection (b)(1) applied only to first assistants.

In any event, interpreting Section 3345(b)(1) to apply to all acting officers does not meaningfully constrain the President's flexibility. It removes just *one* person from the pool of eligible acting officers—the permanent nominee—and only if that person is not a long-serving or Senate-confirmed first assistant. *See Kitsap*, 816 F.3d at 563; Pet. App. 19a-20a. The Government protests that even this limitation is too much because it would force an acting officer to cease his acting service "precisely because [he] ha[s] been deemed most competent to fill the position[] permanently." Pet. Br. 40. But the Government's own evidence confirms that the President routinely directs individuals to begin w rk under the guise of acting service *after* nominating them. *See* Pet. Br. App. A (nearly one-third of nominees were designated as the acting officer after or on the same day as their nomination). And that is exactly the sort of flexibility that Congress did not want the President to have. *Cf. Lee Press Release*, 1997 WL 770918 at *4 ("I have done my best to work with the United States Senate in an entirely constitutional way," but "we had to get somebody into the Civil Rights Division.").

2. The Government next insists that Congress's sole concern about acting service by nominees related to newly appointed first assistants, not PAS officials or senior agency employees. *See* Pet. Br. 38, 42. That argument mischaracterizes the impetus for the FVRA, and it is belied by the statutory scheme that Congress enacted.

Congress was troubled by the circumstances surrounding Bill Lann Lee's nomination and acting service because they exemplified the broader problems leading to the FVRA's enactment. The President designated Lee to serve as the acting officer long after the Vacancies Act's 120-day limit had expired. *See CRS Validity Memo* 2. And because he did so after the Senate refused to confirm Lee for the permanent position, Lee's acting service was a particularly egregious example of the core concern behind the FVRA: the decades-long circumvention and "obliterat[ion] [of] the constitutional requirement that the officer serve only after the Senate confirms the nominee," S. Rep. No. 105-250 at 7; *see Vacancies Act Hearing* 4.

The Government emphasizes a particular aspect of Lee's acting service: that he was brought in from the private sector to serve as the first assistant after the vacancy arose. *See* Pet. Br. 7, 38, 42. But if Congress had been concerned about acting service by newly appointed first assistants, it would have imposed a length-of-service requirement in Section 3345(a)(1). Yet, according to the Government, those individuals are free to serve as acting officials. *See* Pet. Br. 36. Instead of restricting acting service by newly appointed first assistants, Congress chose to restrict acting service by *nominees*. *See* 5 U.S.C. § 3345(b)(1). That choice confirms that Congress actually was concerned about all nominees starting work under the guise of acting service without the Senate's consent—not just newly appointed first assistants.

And indeed, it makes sense that Congress would have been concerned about acting service by all nominees given that the FVRA allowed more people

to serve as acting officers, and for longer periods of time, than previous vacancies statutes. In fact, it was in the course of revising the FVRA to extend acting service from 150 to 210 days, and to allow the potentially thousands of GS-15 employees within an agency to serve as acting officers, that Congress expanded Section 3345(b)(1)'s reach by deleting language that limited its restriction to first assistants. *Compare* S. 2176 at 3 *with* 5 U.S.C. § 3345(b)(1)(A). That deletion can be "fairly seen ... as a deliberate elimination" of any such limitation on Section 3345(b)(1). *Doe*, 540 U.S. at 623; *see also* Pet. App. 19a; *Kitsap*, 816 F.3d at 563. It is also consistent with Congress's pattern of expanding the President's power to fill vacancies in one respect, while also contracting it in another. *See supra* 4-7.

3. The Government claims that interpreting Section 3345(b)(1) to apply to all acting officers is unnecessary to protect the Senate's advice-and-consent role because Subsections (a)(2) and (a)(3) already contain sufficient safeguards. *See* Pet. Br. 42-43. The Government is wrong again.

There are more than 1,200 PAS positions across dozens of agencies. *See* H. Comm. on Oversight & Gov't Reform, 112th Cong., Policy and Supporting Positions app. 1, at 200 (Comm. Print 2012). These positions involve different skill sets, areas of expertise, and types of responsibility The range of PAS positions includes, for example, the Attorney General, Secretary of Defense, NASA Administrator, Federal Mine Safety and Health Review Commission members, and National Council on the Humanities members. Senate confirmation for one of these positions is hardly a proxy for the Senate's consent to

the same individual's service in an entirely different PAS office. And even when positions require similar skill sets, the Senate's consent is not transferrable: A district court judge's unanimous confirmation is no guarantee that the Senate will approve the same individual's nomination to a court of appeals.

Likewise, there are thousands of GS-15 employees, many of whom are hired from outside the Government each year. In 2005, for example, the Government filled more than 3,000 positions at the GS-15 level with external applicants. Merit Systems Protection Board, *In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees Outside the Federal Government*, at 9 (2008), *available at* http://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=323118&version=323564&application=ACROBAT. Service in a particular agency for at least 90 days during the year preceding a vacancy may make an individual competent to keep things running when a vacancy arises. *See* 5 U.S.C. § 3345(a)(3). But it is no substitute for Senate approval before a nominee begins work in a high-level PAS position under the guise of acting service.

The Government's assertion that applying Section 3345(b)(1) to all acting officers "would result in strange asymmetries" ignores the critical differences between a long-serving or Senate-confirmed first assistant and the thousands of individuals holding unrelated PAS or GS-15 positions. Pet Br. 41. As already noted, such first assistants are the acting officials most competent to keep the agency humming. And as nominees, they are the least likely to represent a change to the status quo. There is

nothing odd about Congress's decision to allow these individuals—and no others—to continue to serve in an acting role even when nominated for the permanent position.

Finally, the Government claims that the FVRA should not be interpreted to restrict PAS officeholders' ability to serve simultaneously as acting officers and nominees because the Vacancies Act had allowed them to do so. *See* Pet. Br. 39, 43 n.5. But Congress enacted the FVRA's comprehensive reforms because the Vacancies Act had proved inadequate. Indeed, a first assistant's ability to serve as both the acting official and the nominee was equally well established, and yet the FVRA indisputably restricts it. *See* 5 U.S.C. § 3345(b)(1). There is nothing surprising about Congress also restricting the ability of other acting officers to serve when nominated. That is especially true because the pool of eligible acting officers had grown dramatically in the 130 years between the passage of the FVRA and the Vacancies Act.

4. The only aspect of the FVRA's history that even arguably supports the Government's position is a single sentence on the Senate floor by Senator Thompson. *See* Pet. Br. 47-48 (quoting 144 Cong. Rec. 27,496 (daily ed. Oct. 21, 1998)). But Senator Thompson's comment "is not the only statement on the subject." *Kitsap*, 816 F.3d at 562.

Senator Byrd, "an original sponsor of the [FVRA]," offered a comprehensive analysis of Section 3345 that directly contradicts Senator Thompson's statement. 144 Cong. Rec. 27,497-98 (statement of Sen. Byrd). Using language that "hew[s] much more closely to the

statutory text," Pet. App. 18a, Senator Byrd explained:

> Section 3345 applies when an officer dies, resigns or is otherwise unable to perform the functions and duties of the office. ... Should one of these situations arise, the officer's position may then be filled temporarily by either: (1) the first assistant to the vacant office; (2) an executive officer who has been confirmed by the Senate for his current position; or (3) a career civil servant, paid at or above the GS-15 rate, who has served in the agency for at least 90 of the past 365 days. *However, a person may not serve as an acting officer if:* (1)(a) *he is not the first assistant*, or (b) he has been the first assistant for less than 90 of the past 365 days, and has not been confirmed for the position; and (2) the President nominates him to fill the vacant office.

144 Cong. Rec. 27,498 (statement of Sen. Byrd) (emphasis added).

Quoting Senator Byrd's last sentence in isolation, the Government dismisses his analysis as "vague language" that "offers little guidance" because it "does not specifically mention Subsections (a)(2) or (a)(3)." Pet. Br. 48. But Senator Byrd described the operation of all of Section 3345 in detail in the immediately preceding sentences. And it is hard to imagine a clearer statement than "a person may not serve as an acting officer if he is not the first assistant."

The Government also claims that Senator Byrd's statement is less authoritative than Senator

Thompson's because "Senator Byrd was not the author of the language he was addressing." *Id.* Senator Thompson himself acknowledged, however, that "Senator Byrd ... is really in many ways the author of this legislation." 144 Cong. Rec. 22,507 (statement of Sen. Thompson). And in any event, the Government's own authorities confirm that "a sponsor's statement to the full Senate carries considerable weight." *Corley v. United States*, 556 U.S. 303, 318 (2009).

C. The Government's Reliance On Executive Practice Does Not Withstand Scrutiny

In a final effort to rewrite Section 3345(b)(1)'s clear text, the Government turns to the Executive Branch's practice under the FVRA. But neither of the statements on which that practice is based withstands scrutiny. And there is no evidence that the Senate knew about, much less approved of, the Executive's misinterpretation of the FVRA.

1. The Government relies heavily on statements from OLC and GAO to support the Executive Branch's "longstanding interpretation" of the FVRA. *E.g.*, Pet. Br. 14, 50. The Government does not claim, however, that these statements are entitled to *Chevron* deference. Nor could it. *See Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (OLC "advisory opinions" are "not an administrative interpretation that is entitled to deference under *Chevron*[.]"). Neither OLC nor GAO has been "appointed to carry [the FVRA's] provisions into effect." *Edwards' Lessee v. Darby*, 25 U.S. 206, 210 (1827). And while the Government emphasizes

that GAO plays a "role in the FVRA's enforcement scheme," Pet. Br. 50, that role is limited to reporting violations of Section 3346's time limits, *see* 5 U.S.C. § 3349(b)—a separate (and far simpler) question than compliance with Section 3345(b)(1).

In any event, the OLC memorandum contains no analysis of the FVRA's text; it simply states that Section 3345(b)(1)'s limitation applies only to first assistants. *See* 23 Op. O.L.C. at 64. This approach contravenes OLC's own "best practices," which require it to use traditional tools of statutory construction and to consider competing viewpoints in order to ensure advice that is "clear, accurate, thoroughly researched, and soundly reasoned." *See* U.S. Dep't of Justice, Office of Legal Counsel, *Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010), http://goo.gl/g2OIVu. In fact, OLC subsequently repudiated one of the conclusions it reached in this same "question and answer" memorandum, explaining that it "did not thoroughly consider" the issue and its "initial understanding was erroneous." 25 Op. O.L.C. at 179. OLC's unreasoned understanding of Section 3345(b)(1) is equally deficient.

The GAO letter is even less enlightening. Although it notes that first assistants are subject to Section 3345(b)(1), it says nothing about whether those limits also apply to other acting officials. *See* Letter from Carlotta C. Joyner, Director, Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*,

GAO-01-468R, at 2-4 (Feb. 23, 2001), http://www.gao.gov/assets/80/75036.pdf.

These documents hardly represent a "clear and contemporaneous record of how the [FVRA] was understood by" the Executive or Congress (Pet. Br. 50), and are entitled to no deference.

2. The Government contends that the Senate ratified or acquiesced to the Executive Branch's interpretation of the FVRA because it did not object when nominees for a vacant PAS position simultaneously served as acting officers under Subsections (a)(2) or (a)(3). *See* Pet. Br. 51. The Government is wrong.

a. As an initial matter, there is no evidence that the Senate was aware of the Executive Branch's flawed interpretation. The Government claims that a nominee's acting service and prior positions are part of the record before the Senate when it considers nominees. However, none of the evidence it cites (Pet. Br. 52-54 & n.7) specifies that a particular individual was acting under the FVRA (as opposed to one of the 40 other statutes that provide independent, alternative avenues for installing acting officers, *see* S. Rep. No. 105-250 at 16-17), much less that he was doing so pursuant to Subsections (a)(2) or (a)(3). After all, a first assistant's actual job title varies across agencies and positions, and is seldom if ever discernible on its face.

These determinations are not easy. Even the Government has had trouble making them. In its petition for certiorari, the Government identified only 14 nominees who served in violation of the D.C. Circuit's interpretation of Section 3345(b)(1). *See* Pet.

5-6, 10. It took several more months for the Government to complete its analysis—which revealed at least one error in the Government's earlier determinations. *See* Pet. Br. 16 n.3. That analysis also required consulting with at least 11 different agencies (including to determine which position, if any, was the first assistant to each vacant office). *See, e.g.*, Pet. Br. App. 2a-3a nn.3-4, 16a-17a nn.23-24, 19a-20a nn.29-20, 54a n.75. The Government's own arduous efforts belie its assumption that the Senate knew that any of the nearly 20,000 nominees it has considered since the FVRA's enactment were serving in violation of Section 3345(b)(1), much less that the Senate approved the Executive Branch's flawed interpretation.

b. Moreover, even if the Senate had been aware of an individual's improper acting service, it had no obligation to reject otherwise-qualified nominees on that basis. Section 3345(b)(1) prohibits acting service by a permanent nominee. But nothing in the FVRA disqualifies an unauthorized acting officer from the permanent position. And it is hard to imagine why the Senate would reject a nominee of whom it approves. Doing so would only prolong the vacancy—and allow a temporary official who has not received the Senate's consent to keep performing important government functions.

The Government also claims that Congress could have "quickly correct[ed]" the Executive Branch's flawed interpretation by passing new legislation. Pet. Br. 25. But the FVRA itself—which the Government cites as an example of Congress's vigilance in "safeguard[ing] its prerogatives concerning appointments," Pet. Br. 50—was a response to

widespread abuses that had persisted for *25 years*. *See CRS Validity Memo* 4; *Vacancies Act Hearing* 10-13. It is hardly probative that Congress has not enacted new legislation within the FVRA's shorter lifespan, particularly given that Section 3345(b)(1)'s clear text already refutes the Executive Branch's interpretation. *Cf. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994).

c. Against this backdrop, the Government's reliance on *Noel Canning* is misplaced. There is no question that Congress was well aware of the "thousands of intra-session recess appointments" at issue in *Noel Canning*. 134 S. Ct. at 2562. Unlike acting service in violation of Section 3345(b)(1), the fact of a recess appointment is obvious. *See, e.g.*, The White House, Office of the Press Secretary, "President Obama Announces Recess Appointments to Key Administration Posts," 2012 WLNR 179638 (Jan. 4, 2012). Moreover, only 112 individuals have served in violation of Section 3345(b)(1)—approximately 0.6% of the nearly 20,000 nominees the Senate has considered since the FVRA's enactment. *See* Pet. Br. App. A. That makes these individuals unlike the "thousands" of intra-session recess appointees at issue in *Noel Canning*, and more like the 160-plus "historical examples of recess appointments made during inter-session recesses shorter than 10 days": "scattered examples" better "regard[ed] ... as anomalies." *Noel Canning*, 134 S. Ct. at 2567; *see id.* at 2563.

In addition, the Executive Branch's practice under the FVRA for 18 years is not comparable to a settled practice under the Constitution that dates back to

"the beginning of the Republic." *Id.* at 2560. Historical practice is particularly useful to decipher constitutional provisions because of the broad "'terms & phrases necessarily used in such a charter.'" *Id.* (quoting Letter to Spencer Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908)). But when it comes to a statute, its plain text controls. *See, e.g.*, *Brown v. Gardner*, 513 U.S. 115, 121-22 (1994) (60 years of administrative practice cannot overcome clear text).

d. Congress also has not ratified or acquiesced to the Executive Branch's flawed interpretation. To the contrary, several Senators have repudiated it. *See* Pet. Br. 54 n.8; Pet. 28-29. And although the Government claims that these objections came too late, *see* Pet. Br. 20, 54, "[t]he verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible," *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969).

Indeed, "legislative silence" does not amount to approval. *United States v. Wells*, 519 U.S. 482, 495-96 (1997); *see Alexander v. Sandoval*, 532 U.S. 275, 292, (2001) ("It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation."). That is because "several equally tenable inferences may be drawn from such inaction," *Central Bank*, 511 U.S. at 187—including "unawareness, preoccupation, or paralysis," *Zuber*, 396 U.S. at 185 n.21.

Accordingly, "[t]his Court has many times reconsidered statutory constructions that have been passively abided by Congress." *Id.* For example,

Brown rejected the argument that "Congress's legislative silence as to [an agency's] regulatory practice over the last 60 years serves as an implicit endorsement of [the agency's] policy." 513 U.S. at 120-21. And *Solid Waste Agency v. U.S. Army Corps of Engineers* repudiated an agency's claim that Congress "approved [its] ... expansive definition of 'navigable waters'" when Congress "fail[ed] to pass legislation that would have overturned" its regulations. 531 U.S. 159, 168-69 (2001). *Central Bank* similarly held that Congress did not "acquiesce[] in [lower courts'] judicial interpretation" of § 10(b) of the Securities Exchange Act when it amended the law without "overturn[ing] [the] statutory precedent." 511 U.S. at 186. *See also, e.g., Rapanos v. United States*, 547 U.S. 715, 750-751 (2006) (plurality op.) (Congress's failure to act on agency interpretation is not acquiescence; it is a "failure to express any opinion[.]").[6]

The same is true here. Congress's silence regarding the meaning of Section 3345(b)(1) does not mean that it approved of the Executive Branch's interpretation—especially when there is no "evidence to suggest that Congress was even aware of the [Executive's] interpretative position" in the first place. *Brown*, 513 U.S. at 121.

3. At bottom, the Government argues that its interpretation should prevail because the Executive

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[6] *Watson v. United States*, 552 U.S. 74, 82-83 (2007), did not rely on congressional acquiescence to interpret a statute in the first instance. It merely observed that Congress's failure to modify a 14-year-old decision from this Court counseled in favor of *stare decisis*. *See id.*

Branch has gotten away with it for 18 years. But just as "[a] regulation's age is no antidote to clear inconsistency with a statute," *id.* at 122, the Government "may not insulate itself from correction merely because it has not been corrected soon enough," *Summit Petroleum Corp. v. E.P.A.*, 690 F.3d 733, 746 (6th Cir. 2012). That "sort of [18]-year adverse possession ... deservedly has no precedent in [this Court's] jurisprudence." *Rapanos*, 547 U.S. at 752 (plurality op.).

CONCLUSION

For these reasons, the judgment below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 4

17 Journal of the Executive Proceedings of the Senate of the United States from March 5, 1869 to March 3, 1871, Inclusive (1901) 13

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REPLY BRIEF FOR THE PETITIONER

The Federal Vacancies Reform Act of 1998 (FVRA or Act), 5 U.S.C. 3345 *et seq.*, makes three categories of officials eligible to temporarily perform the functions and duties of a vacant presidentially appointed, Senate-confirmed (PAS) office: first assistants to the vacant office (under Subsection (a)(1)), holders of other PAS offices designated by the President (under Subsection (a)(2)), and employees designated by the President who have been senior officials in the agency where the vacancy arises for at least 90 days in the year preceding the vacancy (under Subsection (a)(3)). Subsection (b)(1) then sets out limitations that it makes applicable "[n]otwithstanding" only one of those three categories—the first assistants covered by Subsection (a)(1).

Since the time of the FVRA's enactment, without objection by Congress, Presidents of both parties have

collectively made more than 100 nominations and designations based on the understanding that the limitations in Subsection (b)(1) apply only to first assistants serving under Subsection (a)(1). That settled understanding best accords with the text, objectives, and history of the statute. It avoids attributing to Congress an intent to eliminate *sub silentio* a mechanism for simultaneous service and nomination of PAS officials that had existed without apparent congressional objection for more than a century. And it properly gives significant weight to the manner in which the FVRA has been implemented by the Branches whose prerogatives it addresses.

A. The Executive's Longstanding Interpretation Represents The Best Reading Of The FVRA

The three subsections in Section 3345(a) create three separate paths for becoming an acting official. The terms of each subsection apply in an equally categorical manner when triggered. Yet Section 3345(b) imposes a limitation that applies "[n]otwithstanding" only *one* of these subsections—"subsection (a)(1)." That directive, reinforced by structural features of the statute, establishes that Subsection (b) does not override the separate mechanisms for acting service in Subsections (a)(2) and (a)(3). Respondent fails in its attempts to explain away the statutory design.

1. a. Respondent acknowledges (Br. 40) that when included and omitted items in a statute are both "members of an 'associated group or series,'" it is normally appropriate to infer that the omitted items were "excluded by deliberate choice." Gov't Br. 28 (quoting *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003)). That principle applies here. Subsections (a)(1), (a)(2) and (a)(3) are members of an associated

group: they were enacted at the same time, in the same statutory subsection, and they provide authorization for the same acting status, subject to the same time limits, with the same penalties for violations. See *id.* at 29-30. Congress's directive that Subsection (b)(1) overrides only the mechanism for acting service by first assistants in Subsection (a)(1) thus indicates that Congress did not intend Subsection (b)(1) to override the alternative mechanisms for acting service in Subsections (a)(2) and (a)(3).

Respondent suggests (Br. 40-41) that Congress might have specified that Subsection (b)(1) overrides only Subsection (a)(1) because Subsection (b)(1) conflicts only with that subsection. That is not so. Subsections (a)(2) and (a)(3) grant the President an unqualified power to "direct a person" who already holds a PAS post or who occupies a senior agency position "to perform the functions and duties of the vacant office temporarily in an acting capacity." 5 U.S.C. 3345(a)(2)-(3). Subsection (b)(1) conflicts with that authorization, too.

Respondent also seeks to avoid application of the *expressio/exclusio* canon by hypothesizing (Br. 40-41) that a different background rule governs conflicts that involve provisions that "grant the President discretion" as compared to provisions that operate "automatically." But respondent identifies no authority suggesting that when a statutory provision is automatic, a "notwithstanding" provision is needed to resolve a conflict with that provision, but that when a provision confers discretion on a government official, no "notwithstanding" provision is called for. On the contrary, in the absence of express textual indicators, the same default principle—that "the specific governs

the general"—would resolve the conflict between each of the three mechanisms in Subsection (a) and Subsection (b)(1). *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (citation omitted); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183-188 (2012).

That principle applies whether a conflict involves a discretionary grant of permission or an automatic rule. See, *e.g.*, *RadLAX*, 132 S. Ct. at 2071 (noting that specific "permission" takes precedence over a general "prohibition" and vice versa); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378-379, 384-385 (1992) (applying general/specific canon in context of non-discretionary rule). Respondent's examples of statutes in which a grant of discretion is cabined by a narrower limitation (Br. 41-42) do not involve "notwithstanding" clauses at all, much less a clause (like in Subsection (b)(1)) expressly made applicable to only one of a series of statutory provisions. And they simply reflect application of the general/specific canon.

There is, in short, no canon that explains Congress's disparate treatment of the mechanisms for acting service in Subsections (a)(1), (a)(2) and (a)(3) other than the canon invoked by the government (as well as the author of Subsection (b)(1))—*expressio unius est exclusio alterius*. See 144 Cong. Rec. 27,496 (1998) (statement of Sen. Thompson) (explaining that "the revised reference to § 3345(a)(1)" in Subsection (b)(1) "means that this subsection applies only when the acting officer is the first assistant, and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3)").

b. Respondent's other principal argument misstates the government's position. Respondent emphasizes (Br. 28-29) that "notwithstanding" means "in spite of"—so that the notwithstanding clause "mak[es] clear that Section 3345(b)(1)'s restrictions override Section 3345(a)(1)'s mandate." *Id.* at 29. As explained in the government's opening brief (Br. 27), the government agrees that "notwithstanding" clauses serve exactly that function, "dictat[ing] which contradictory provision is to prevail." *Ibid.* (citation omitted). But as respondent ultimately concedes (Br. 40), under the *expressio/exclusio* canon, a statement that a rule *does* prevail over one member of an associated group commonly signals that the rule *does not* prevail over other members of the same group that are not mentioned. Gov't Br. 27-30.

Because respondent is wrong in asserting that the government contests the ordinary meaning of "notwithstanding," the court of appeals decisions respondent invokes, interpreting statutes other than the FVRA (Br. 39-40), do not bear on the issue in this case. None of those decisions addressed a provision with a "notwithstanding" clause that overrode only one of several subsections with which it conflicted. *In re Lifschultz Fast Freight Corp.*, 63 F.3d 621 (7th Cir. 1995), construed 49 U.S.C. 10701(f) (1995), which specified that small businesses "shall not be liable" for "undercharge" claims by freight carriers, "[n]otwithstanding" each of the three statutory mechanisms that otherwise provided for satisfaction of undercharge claims. 63 F.3d at 630-631. There was no additional provision governing satisfaction of undercharge claims that Congress chose not to override through the "notwithstanding" clause. *Deutsche Bank National Trust*

Co. v. *Tucker*, 621 F.3d 460 (6th Cir. 2010), is even further afield: it stands for the uncontroversial proposition that a "notwithstanding" clause overrides the provision it expressly mentions. *Id.* at 463-464 (section providing that the amount to cure default should be calculated in accordance with any underlying contract, "[n]otwithstanding . . . section[] 506(b)," overrides method of calculation in Section 506(b) of Title 11) (brackets in original).

Notably, in several decisions that do address "notwithstanding" provisions that override only one of several associated statutory mechanisms, courts (including this Court) have recognized an inference of *expressio/exclusio*. See *Preseault* v. *ICC*, 494 U.S. 1, 13-14 (1990) (concluding that when a provision stated that spending limits in the provision were applicable "[n]otwithstanding any other provision of *this* Act," the National Trails Act Amendments of 1983, Pub. L. No. 98-11, Tit. II, 97 Stat. 42, the "notwithstanding" clause evidenced that the limitation "speaks only to appropriations under the [National Trails Act Amendments of 1983] and not to relief available under the Tucker Act") (emphasis in original); *Shomberg* v. *United States*, 348 U.S. 540, 545 (1955) (concluding that provision specifying that immigration limit applied "'[n]otwithstanding the provisions of section 405(b),' * * * at first glance might indicate that it was not intended to apply to [Section] 405(a)," but finding that other features of statutory structure and history counseled different interpretation); see also *SEC* v. *Mount Vernon Mem'l Park*, 664 F.2d 1358, 1363 (9th Cir.) (concluding that when Subsections (a)(1), (a)(2) and (a)(3) defined "investment companies," and Subsection (b)(1) provided an exemption to

investment-company status "[n]otwithstanding paragraph (3) of subsection (a)," the exemption overrode only Subsection (a)(3), and not Subsections (a)(1) and (a)(2)), cert. denied, 456 U.S. 961 (1982) (brackets in original; citation omitted).

The government's "notwithstanding" argument, moreover, is bolstered by a related aspect of the text to which respondent offers no meaningful response. As the government's opening brief explains (Br. 30), three other places in Section 3345 have directly parallel "notwithstanding" clauses referring to Subsection (a)(1), and all override only the automatic accession rule in Subsection (a)(1). Respondent does not deny the point, and even acknowledges (Br. 28) that the FVRA's "notwithstanding" clauses should be read consistently. Yet respondent introduces asymmetry, by reading Subsection (b)(1)'s "notwithstanding" clause as though it said "notwithstanding subsection (a)"—or "notwithstanding subsections (a)(1), (a)(2), and (a)(3)"—rather than "notwithstanding subsection (a)(1)."

c. Respondent's remaining textual arguments lack merit. Like the court of appeals, respondent focuses (Br. 24-27) on the reference to a "person" and "this section" in Subsection (b)(1)'s second clause, contending that these usages show that Subsection (b)(1) overrides the entirety of Subsection (a). That contention falls short.

First, Congress's use of the term "person" simply reflects that Subsection (b)(1) refers to an individual both in his official capacity as a first assistant and in his personal capacity as a nominee. The term "person" is used to embrace both. And the phrase "under this section" makes clear that Subsection (b)(1) re-

stricts service upon nomination only by first assistants who are serving in an acting capacity pursuant to the FVRA, and not by first assistants serving pursuant to any of the other statutes providing mechanisms for acting service.

Second, respondent fails to account for the equally broad language authorizing acting service in Subsections (a)(2) and (a)(3). 5 U.S.C. 3345(a)(2) (authorizing designation of any "person" who serves in a PAS position, subject only to "the time limitations of section 3346"); 5 U.S.C. 3345(a)(3) (authorizing designation of any "officer or employee" meeting specified criteria, subject only to "the time limitations of section 3346"). The question is not whether the "person" and "this section" language in Subsection (b)(1) is broad; the question is how to reconcile the language in Subsection (b)(1) with equally broad language in Subsections (a)(1), (a)(2) and (a)(3). Congress resolved that question through the "notwithstanding" clause, which directs that Subsection (b)(1) take precedence over only Subsection (a)(1), and not Subsection (a)(2) or (a)(3).

Third, respondent's focus on "person" and "this section" in Subsection (b)(1) fails to account for related FVRA provisions. As the government observes in its opening brief (Br. 34), the very next subsection, Subsection (b)(2), speaks of a "person" rather than a "first assistant" in the context of a provision that applies solely to first assistants. Indeed, the language in Subsection (b)(1) on which respondent relies was carried over from an earlier draft that used the terms "person" and "this section" even though it imposed limitations that were indisputably applicable only to first assistants. *Ibid.* That makes it particularly in-

appropriate to infer from "person" and "under this section" that Subsection (b)(1) was intended to cover non-first-assistants.

Finally, as the American Federation of Labor and Congress of Industrial Organizations observes (Amicus Br. 12-13), Subsection (c)(1) also contradicts respondent's understanding of the "person" and "this section" language. If the limitations on acting service that Subsection (b)(1) imposes only "[n]otwithstanding subsection (a)(1)" actually applied to all "persons" serving in an acting capacity under Section 3345, then Subsection (b)(1) would nullify Subsection (c)(1), which authorizes the President to direct an officer to continue to serve in a vacant PAS office when renominated without a break in service for a subsequent term in office. 5 U.S.C. 3345(c)(1).[1] Respondent acknowledges that cannot be so (Br. 45-46), and accordingly would read Subsection (b)(1), which expressly overrides only Sub-

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[1] Respondent is mistaken in suggesting (Br. 45-46) that nominees whose terms have expired are not engaged in "acting service" when they perform the duties of their former posts under Subsection (c)(1). The FVRA makes clear that "expiration of a term of office" gives rise to an "inability to perform the functions and duties of such office," 5 U.S.C. 3345(c)(2), triggering the President's authority to designate an acting officer, 5 U.S.C. 3345(a); see Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 65-66 (1999) (explaining that Section 3345(c)(2) is an authorization of acting service); Inapplicability of the Federal Vacancies Reform Act's Reporting Requirements When PAS Officers Serve Under Statutory Holdover Provisions, 23 Op. O.L.C. 178, 179 (1999) (describing Section 3345(c) as "creating an additional class of acting officers"). And Congress placed Subsection (c)(1) within the FVRA provision entitled "Acting officer" and subjected individuals serving under Subsection (c)(1) to the time limits for how long an "acting officer * * * may serve." 5 U.S.C. 3345(c)(1), 3346(a).

section (a)(1), to override Subsections (a)(1), (a)(2), and (a)(3), but not Subsection (c)(1). In particular, respondent argues that Subsection (c)(1) may nevertheless take precedence over Subsection (b)(1) despite the latter's "person" and "this section" language if the two provisions are reconciled using other principles of interpretation. Resp. Br. 45-46 (citing general/specific canon). But that is just the government's point. When two provisions set out conflicting directives, surrounding text and canons determine which takes precedence. Here, the "notwithstanding" clause overriding Subsection (a)(1) alone indicates that the limits in Subsection (b)(1) do not override the parallel acting-service mechanisms in Subsections (a)(2) and (a)(3).

d. Respondent's superfluity arguments fare no better. Respondent first asserts a superfluity that no court has ever found. It argues (Br. 29-30) that the government renders superfluous the provision for automatic continued service by Senate-confirmed first assistants in Subsection (b)(2) because under the government's view, in the absence of Subsection (b)(2), the President could designate Senate-confirmed first assistants to serve in an acting capacity under Subsection (a)(2). To state this argument is to refute it: because Subsection (a)(2) requires a presidential designation, the provision in Subsection (b)(2) allowing continued *automatic* service by Senate-confirmed first assistants is consequential when the President has not yet chosen whom he wishes to serve as the acting official. Indeed, provisions for automatic service spare the President from having to make any designation at all.

Respondent also repeats (Br. 31) the court of appeals' suggestion that the government's interpretation might render Subsection (b)(1)(A)(i) superfluous. But

respondent does not dispute that there is no superfluity so long as Subsection (a)(1) applies to individuals who become first assistants after vacancies arise—for example, those who become first assistant to a vacant office at the start of an administration. That reading of Subsection (a)(1) is correct, as the Department of Justice's Office of Legal Counsel (OLC) and the Government Accountability Office (GAO) each concluded (see Gov't Br. 36), and respondent advances no argument to the contrary.

Finally, contrary to respondent's contention (Br. 30-31), the government's interpretation does not render Subsection (b)(2)(A) superfluous. Subsection (b)(2)(A) is in a provision that carves out an exception based in part on *current* service to Subsection (b)(1)'s bar based on insufficient *past* service, and it enhances clarity by making the bar in Subsection (b) self-contained. That point is not contradicted by respondent's sole response (Br. 31)—that Subsection (b)(*2*) does not refer to nomination—because Subsection (b)(*1*) makes clear that all of Subsection (b) applies only to persons who are nominated.

B. The Executive's Interpretation Aligns With The Statute's Objectives

The manner in which the FVRA has been applied since its enactment accords with the statute's design. Respondent's reading, in contrast, would produce disparities that bear no relationship to the statute's goals.

1. Respondent's reading of the FVRA would undo nearly 150 years of practice under the Act of July 23, 1868 (Vacancies Act), ch. 227, 15 Stat. 168, by forbidding virtually all PAS officers from simultaneously serving as nominee and acting official. But it would be

surpassingly strange for Congress to have undone such a longstanding practice without any discussion or explanation as to why Congress would have allowed non-Senate-confirmed first assistants to serve in an acting capacity when nominated, but would have forbidden such acting service by Senate-confirmed individuals. As respondent acknowledges (Br. 7-11), the FVRA was enacted in response to a lengthy history of congressional objection to acting designations that were seen as evasions or abuses of the Vacancies Act framework. Those objections were well-documented in floor statements, hearings, and reports. But respondent is unable to identify an occasion on which even a single Member of Congress either criticized acting service by Senate-confirmed officers, including those nominated to fill positions on a permanent basis, or suggested that the practice be modified. And none of the bills to address perceived abuses of the Vacancies Act would have done so. Gov't Br. 9 n.1.

Respondent hypothesizes (Br. 50-52) that Congress could have silently harbored a desire to rescind that longstanding authorization, because it could have feared that an individual confirmed for one PAS post would be ill prepared for the duties of a different, vacant post. But that hypothesis is wholly unsupported by the history surrounding the FVRA. And while respondent hypothesizes (Br. 52) that Congress might have developed this unarticulated concern "because the pool of eligible acting officers had grown dramatically in the 130 years between the passage of the FVRA and the Vacancies Act," the number of PAS officers then was comparable to the number of such officers today, because many minor posts required Senate confirmation at the time of the Vacancies Act's

enactment. Compare 17 Journal of the Executive Proceedings of the Senate of the United States from March 5, 1869 to March 3, 1871, Inclusive (1901) (listing over 1600 presidential nominations to non-military, non-judicial PAS posts in just the last ten months of 1869, the year after the Vacancies Act's passage), with Resp. Br. 50 (stating that there now exist more than 1200 PAS posts).[2]

Moreover, an unarticulated concern regarding PAS officers' qualifications cannot account for the result that respondent's reading would achieve. Even under respondent's view, the FVRA allows a PAS official to serve in an acting capacity in a vacant post as long as the official is not also the President's nominee. Respondent's qualifications hypothesis cannot explain why Congress would have prohibited acting service by a PAS official only when the President considers the official so well qualified as to warrant serving in the position permanently.

The weakness of respondent's hypothesis is underscored by the fact that the non-Senate-confirmed first assistants who can be the nominee under its interpretation are often political appointees who have never been subjected to Senate confirmation at all. Indeed, concern about acting service by non-Senate-confirmed individuals was a central impetus for the FVRA. If the FVRA were designed to prevent the President from authorizing acting service by a nominee "before the Senate approves," Resp. Br. 33, it would not have barred acting service by nominees *already* found

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[2] In practice, when Senate-confirmed individuals are designated as acting, the vast majority come from the agency with the vacancy, and most others come from closely related agencies or positions. See Gov't Br. App. 1a-81a.

qualified by the Senate for high-ranking government positions, while at the same time permitting acting service by first assistants with a mere 90 days of prior service who have never received confirmation.

2. Respondent alternatively asserts (Br. 32) that the disparities its interpretation produces could be explained by the objective of preventing the President from "install[ing] his chosen officeholder to perform the duties of a PAS office without obtaining the Senate's approval"—a form of acting service that respondent asserts Congress saw as circumventing "the Senate's role under the Appointments Clause." *Ibid.*

This argument is equally flawed. Respondent identifies no support in the extensive FVRA record for its hypothesis that Congress saw a circumvention of the Senate's prerogatives whenever the President designated his nominee to perform acting duties. Rather, Congress's concern was that the Executive Branch was encroaching upon the Senate's advice-and-consent role because it was failing to abide by the limits that Congress had set out in the Vacancies Act. See S. Rep. No. 250, 105th Cong., 2d Sess. 3-9 (1998) (*Senate Report*) (explaining the "need for legislation"); *Oversight of the Implementation of the Vacancies Act: Hearing Before the Senate Comm. on Governmental Affairs*, 105th Cong., 2d Sess. 1-25 (1998) (many Senators' statements regarding reasons for enactment).

In any event, respondent's hypothesis again fails to explain the disparities that its reading produces. If Congress wished to bar Presidents from "put[ting] their ultimate choice for a vacant position to work" without Senate approval (Resp. Br. 32), it would make little sense to bar simultaneous service by PAS officials and senior agency employees, while permitting

such service by first assistants who can often be political appointees with close ties to the President.

3. The disparities that respondent's reading produces are particularly anomalous because an important goal of the FVRA was to give Presidents additional flexibility to make acting designations, in exchange for barring the types of designations that Congress had seen as evasions. See Gov't Br. 39-41.

Respondent seeks to minimize the extent to which its interpretation undermines presidential flexibility and good government by arguing (Br. 47) that its interpretation merely removes one person from the pool of acting officers. But the person respondent would remove is the person the President deems most qualified for the post. It would significantly undermine Congress's objective to construe the FVRA to bar service under Subsections (a)(2) and (a)(3) whenever the President concludes the designated person is most qualified to serve permanently. Particularly given that PAS positions include critical national security, intelligence, and public safety posts, respondent errs in minimizing the costs of requiring the selection of less suitable candidates and forcing potentially disruptive leadership changes. See Gov't Br. 40-41.

4. In contrast to respondent's interpretation, the interpretation of the statute that has long been applied by the Executive reflects Congress's declared objectives and creates no unexplained disparities. Under the Executive's interpretation, Subsection (b)(1) responds to a concern that animated the passage of the FVRA: curtailing acting designations based on eleventh-hour first assistant appointments from outside the government that Members of Congress saw as attempts to manipulate the categories of

congressionally authorized acting service. That was the concern that the Senate Report explained was addressed by the first-assistant length-of-service limitations. *Senate Report* 13; see also 144 Cong. Rec. at 12,431-12,432 (statement of Sen. Thompson on behalf of sponsors). That objective does not support extending the first-assistant-centric limits of Subsection (b)(1) to individuals serving under Subsections (a)(2) and (a)(3), because those provisions contain parallel safeguards against eleventh-hour appointments to circumvent Congress's category-of-service restrictions—by requiring either prior Senate confirmation or 90 days of prior service as a senior agency employee. See Gov't Br. 41-42.[3]

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[3] Contrary to respondent's assertion (Br. 35-37), no background constitutional principle supports respondent's interpretation. Because statutes enabling Executive Branch officials to carry out the responsibilities of vacant offices have existed since the Founding Era (see Gov't Br. 4), there can be no serious question about their constitutionality. And respondent does not assert that there actually would be any question of the constitutionality of the FVRA as it has long been understood.

Respondent, moreover, does not adhere to a "constitutional 'norm'" of permitting only "Senate-confirmed 'Officers of the United States'" to perform important governmental functions (Br. 36), because respondent would disqualify non-Senate-confirmed individuals from acting service only upon nomination. Such a restriction is more properly viewed as an unusual encroachment upon the President's authority to "nominate * * * Officers of the United States," U.S. Const. Art. II, § 2, Cl. 2, than as a protection of the Senate's confirmation prerogative. Further, because respondent would give priority to acting service by non-Senate-confirmed first assistants over Senate-confirmed officers designated under Subsection (a)(2), respondent's interpretation actually disfavors service in accordance with the "norm" of Senate confirmation. And because respondent would bar acting service only

C. Legislative History Strongly Supports The Executive's Interpretation

As the government's opening brief outlines, the FVRA as initially drafted undisputedly restricted acting service by a nominee only for recently appointed first assistants. The subsequent linguistic changes were the product of many Senators' refusal to allow cloture until the bill was revised to give Presidents *more* flexibility, including by reducing the time-in-service requirement that applied (and was repeatedly described as applying) only to first assistants. That context counsels strongly against respondent's reading of Subsection (b)(1). Gov't Br. 45-48.

Respondent does not dispute the events that led to the bill's revision. Respondent nonetheless asserts (Br. 47) that if Congress intended only to reduce the time-in-service requirement for first assistants in the reported bill, "Congress would have simply replaced '180 days' with '90 days' without making substantial other changes." But Congress made a number of liberalizing changes, including adding an entirely new Subsection (b)(2) that expanded the bounds of permissible first-assistant service; revising Subsection (a)(1) so that it expressly permits first assistants to serve in an acting capacity even if they become first assistants after a vacancy arises, see *id.* at 36; and authorizing service by senior agency officials under Subsection (a)(3). The manner in which the Senate revised Subsection (b)(1) as part of that process—by stating that Subsection (b)(1) applies "notwithstanding" only the

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when a nomination has occurred, respondent's construction would have the ironic effect of encouraging the President *not* to present his preferred candidate to the Senate—particularly toward the end of an Administration.

first-assistant mechanism for acting service—ensured that all Subsection (a)(1) first assistants were subject to the limits in Subsection (b)(1), while other acting officials were not subject to those first-assistant-focused limits. 5 U.S.C. 3345(b)(1).[4] As the amendment's author explained, "the revised reference to § 3345(a)(1)" in Subsection (b)(1) "means that this subsection applies *only* when the acting officer is the first assistant, *and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3)*." 144 Cong. Rec. at 27,496 (statement of Sen. Thompson) (emphasis added).

In rejecting the drafter's understanding, respondent places substantial reliance on a passing statement by Senator Byrd. But while Senator Byrd was among the sponsors of the initial version of the FVRA, he was not the author of the later amendment that created the restriction at issue here. Senator Thompson was. See 144 Cong. Rec. at 22,015. And examination of Senator Byrd's statements shows that far from "describ[ing] the operation of all of Section 3345 in detail," Resp. Br. 53, Senator Byrd omitted parts of the scheme—for instance, by failing to acknowledge that a vacancy can be filled on an acting basis by a person previously Senate-confirmed for the post, pursuant to Section 3345(c)(1). And his paraphrase contains nu-

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[4] Without Congress's revision of Subsection (b)(1), the subsection would have applied only to first assistants in place before the vacancy arose—those who had served as first assistant to the last PAS "officer"—but not to later-appointed first assistants, such as first assistants who came in at the start of an Administration when a vacancy already existed. See *Senate Report* 25 (initial draft specifying that Subsection (b)(1) applies only to those "serv[ing] in the position of first assistant to such officer" on the date of the vacancy).

merous loose descriptions that do not accurately capture the contours of permitted acting service.[5] The explanation by the author of Subsection (b)(1), which specifically addressed the meaning of its "notwithstanding" clause, is a better guide to the subsection's meaning.

D. Longstanding Practice Deserves Significant Weight In Construing The FVRA's Allocation Of Power Between The Elected Branches

Within months after the FVRA's passage, OLC set out its understanding that the limitation in Subsection (b)(1) applies only to first assistants. GAO later reached the same conclusion, and the three Presidents since the FVRA's enactment have collectively made over 100 nominations relying on that determination. That clear history, unaccompanied by any Senate objection before the decision below, is entitled to great weight. See Gov't Br. 48-55.

1. Respondent urges this Court (Br. 54-56) to discount that contemporaneous and longstanding construction on the theory that the Senate somehow may not have observed the manner in which the statute

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[5] For instance, Senator Byrd asserted that a person could not be the nominee and acting officer if "(1)(a) he is not the first assistant, or (b) he has been the first assistant for less than 90 of the past 365 days, and has not been confirmed for the position." 144 Cong. Rec. at 27,498. But the FVRA *does* permit a person to serve as acting officer and nominee if "he is not the first assistant," *ibid.*, when the official had at least 90 days of service as first assistant in the year before the vacancy arose—even if the official then left the first assistant position. 5 U.S.C. 3345(b)(1). And the FVRA does *not* permit all individuals who served as first assistant for "90 of the past 365 days," to serve as both acting official and nominee; the individual must have served that period in the year before the vacancy arose. 144 Cong. Rec. at 27,498.

was implemented by every Administration, vacancy after vacancy, since its enactment. That assertion is mistaken several times over.

As the government's opening brief explains, the interpretation of the statute that has prevailed since its enactment has been embodied both in appointments practice and in published opinions of both the OLC and GAO. Respondent fails to explain how the Senate could have failed to "kn[o]w about * * * the Executive's" supposed "misinterpretation of the FVRA" (Br. 54) when the Executive Branch announced that interpretation shortly after the statute was enacted and openly implemented it in high-profile appointments from the start.

Indeed, respondent's hypothesis of Senate ignorance is particularly hard to accept given that GAO—an arm of Congress that has overseen appointment practices since before the FVRA and has an oversight role under the FVRA itself (Gov't Br. 50-51)—adopted the Executive's construction in response to a request for guidance from the chairman of the Senate Committee on Governmental Affairs, in a memorandum disseminated publicly and to committee members. See Letter from Carlotta C. Joyner, Dir., Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R, at 4-5 (Feb. 23, 2001), http://www.gao.gov/assets/80/75036.pdf (Joyner).

Respondent errs in suggesting (Br. 55) that GAO did not speak to whether Subsection (b)(1) applies to acting officials other than first assistants. GAO described "the four ways that an individual may be eligi-

ble to serve as an acting official *and the eligibility criteria for each situation*." Joyner 2 (emphasis added). After including the limits of Subsection (b)(1) in its description of the criteria for first assistants serving under Subsection (a)(1), GAO omitted those limits when describing the requirements for acting service by PAS officials and senior agency personnel under Subsections (a)(2) and (a)(3). *Ibid.* GAO stated that the FVRA "does not impose any limitation on which PAS officials the President may designate," and further stated that the FVRA imposes three limitations (none which has to do with nomination status) on senior agency employees eligible to serve. *Id.* at 2-3. Even respondent previously described GAO's guidance as "assuming * * * that Section 3345(b)(1)'s prohibition applies only to first assistants." Br. in Opp. 22.

Moreover, as the government's opening brief sets out (Br. 51-54 & App. 1a-81a), Presidents have acted on OLC and GAO's understanding from the time of the FVRA's enactment. The Senate has routinely confirmed such nominees, with no evidence that any Senator raised an FVRA objection. Respondent suggests (Br. 56) that Senators considering such nominations might have believed that the nominees were serving under "one of the 40 other statutes that provide independent, alternative avenues for installing acting officers." *Ibid.* (citing *Senate Report* 16-17). But that misapprehension would not have been plausible: all but three of the 111 cited designations were made to positions that are not covered by any of those

alternative-designation statutes. Compare *Senate Report* 16-17 with Gov't Br. App. 1a-81a.[6]

Respondent alternatively posits (Br. 56) that the Senate might not have known that nominees serving in an acting capacity were not first assistants. That is equally mistaken. Many nominees were to high-profile positions, such as the Deputy Attorney General or Secretary of the Air Force. See Gov't Br. 15-16. A number of nominees came to their acting positions from entirely different agencies (and thus had to have been designated under Subsection (a)(2)). See, *e.g.*, Gov't Br. App. nn.31, 36, 50, 54, 59, 73, 79, 81, 82, 84, 113. Others had served on an acting basis in positions different from the ones identified as first assistant by statute, regulation, or published *Federal Register* notice. See, *e.g.*, *id.* nn.16, 41, 55, 77, 83, 87, 94. And still others were elevated to acting posts after service in entirely separate divisions of the agencies where they worked. See, *e.g.*, *id.* at nn.2, 5, 7, 21, 22, 26, 45, 49, 60, 61, 62, 71, 89.

Respondent alternatively posits (Br. 57) that the Senate might not have wished to refrain from confirming qualified nominees. But it offers no explanation

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[6] In the three remaining instances, the non-FVRA statute was facially inapplicable. See 15 U.S.C. 633(b)(1) (authorizing Deputy Administrator of Small Business Administration to serve as Acting Administrator); Gov't Br. App. 58a (showing Santanu Baruah held different post); 12 U.S.C. 635a(b) (authorizing First Vice President of Export-Import Bank to serve as Acting President); Gov't Br. App. 27a (showing James Lambright held different post); 29 U.S.C. 153(d) (stating that designation of Acting General Counsel of the National Labor Relations Board expires at end of Senate Session in which the President submits a nomination); Gov't Br. 17-18 (showing Lafe Solomon's nomination was pending in multiple Sessions).

for why Senators who perceived Presidents as encroaching on their role would not have expressed that disagreement in *some* fashion—such as through holding hearings, making speeches, introducing statutory amendments, or soliciting reports from congressional watchdog agencies. That silence is particularly telling because the FVRA was passed precisely because Congress had been closely watching the designation practices of the Executive, and because Members of Congress had taken every one of those steps to object when they perceived encroachments on Congress's authority under the Vacancies Act. See Gov't Br. 6-7. But it was not until after the decision in this case called into question the longstanding interpretation of the FVRA that one Senate Committee declined to hold confirmation hearings on two nominees until they stepped down from acting posts, and the chairman of another Committee questioned an official's continued acting service. Pet. 28-29.

2. Respondent offers no reason to depart from the principle of placing "significant weight upon historical practice" in interpreting provisions that "concern the allocation of power between two elected branches of Government." *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (emphasis omitted); see Gov't Br. 48-50. The cases on which respondent relies for the proposition that "'legislative silence' does not amount to approval," Resp. Br. 59, did not concern statutes that relate to the elected Branches' institutional prerogatives and interactions. Established practice warrants great respect in that context. That is especially so concerning the advice-and-consent process, which contemplates particular scrutiny and affirmative approval by the Senate of each nominee as a precondi-

tion to appointment. Indeed, congressional inaction has particular persuasive value in areas of frequent congressional involvement. See *Zuber* v. *Allen*, 396 U.S. 168, 185 n.21 (1969).

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Acting Solicitor General

OCTOBER 2016

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No. 15-1251

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SW GENERAL, INC., D/B/A SOUTHWEST AMBULANCE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 56 national and international labor organizations with a total membership of 12.5 million working men and women.[1] This case concerns the extent of the President's authority to direct a high-level career employee of the National Labor Relations Board to temporarily perform the functions of the NLRB General Counsel when that position becomes vacant. The NLRB General Counsel plays a crucial role in the enforcement of the National Labor Relations Act. The AFL-CIO, and its affiliates, have a vital interest in the effective enforcement of the NLRA.

SUMMARY OF ARGUMENT

Except where some other statute expressly provides an alternative means, Section 3345 of the Federal Vacancies Reform Act (FVRA) provides the exclusive means for temporarily authorizing a federal official to perform the functions and duties of a vacant Executive office that can be permanently filled only by a Presidential appointment with the consent

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[1] Counsel for the petitioner and counsel for the respondent have consented to the filing of this *amicus* brief in letters that have been filed with the clerk. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

of the Senate. Subsection (a)(1) of the FVRA provides that the first assistant to the office will automatically assume the functions and duties on a temporary basis when the permanent office-holder vacates the office or is otherwise unable to perform.

Subsections (a)(2), (a)(3) and (c)(1) each provides an alternative method for the President to fill a vacancy on a temporary basis. Subsection (a)(2) allows the President to designate someone who holds a different Senate-confirmed appointment. Subsection (a)(3) allows the President to designate a high-ranking long-term employee from within the agency. Subsection (c)(1) allows the President to designate an office-holder whose term has expired but who has been nominated for reappointment. To indicate that these methods are alternatives to the automatic appointment provided for in subsection (a)(1), each of these subsections begins with the phrase "[n]otwithstanding subsection (a)(1)" or the equivalent phrase "notwithstanding paragraph (1)."

Subsection (b)(1) provides another exception to the automatic appointment provided for in subsection (a)(1). This subsection provides, as general matter, that "[n]otwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section" if "the President submits a nomination of such person to the Senate for appointment to such office." As with the other subsections, the phrase "[n]otwithstanding subsection (a)(1)" in subsection (b)(1) indicates that the limitation on temporary appointments stated there affects only appointments made pursuant to subsection (a)(1).

The court below recognized that the term "notwith-

standing" means "in spite of," "in derogation of," or "superseding." But the court refused to accord this meaning to the phrase "notwithstanding subsection (a)(1)" as it was used in subsection (b)(1). Indeed, the court accorded no significance whatsoever to the phrase. Instead, the court of appeals focused on various other phrases in the FVRA, which the court thought indicated a broad application of subsection (b)(1). The court's textual analysis of these various phrases does not withstand scrutiny.

ARGUMENT

Section 3345(a)(1) of the Federal Vacancies Reform Act (FVRA) provides that when an officer of an Executive agency becomes unable to perform the functions and duties of his or her office "the first assistant to the office of such officer shall perform the functions and duties temporarily in an acting capacity." 5 U.S.C. § 3345(a)(1). Subsections (a)(2), (a)(3), and (c)(1) provide three alternative methods by which the President can temporarily fill such a vacancy "notwithstanding subsection (a)(1)." 5 U.S.C. §§ 3345(a)(2) (designating someone who holds a different Senate-confirmed appointment), 3345(a)(3) (designating a high ranking long-term employee from within the agency) & 3345(c)(1) (designating a person who has been nominated for reappointment to the office but whose term has expired).

Subsection (b)(1) provides that "[n]otwithstanding subsection (a)(1), a person may not serve as an acting officer under this section" if the person has been nominated by the President for appointment to the office and has not "served in the position of first assistant to the office of such officer" for at least 90 days

during the 365 days preceding the occurrence of the vacancy. 5 U.S.C. § 3345(b)(1). In the two decades since enactment of the FVRA, Presidents Clinton, Bush and Obama each frequently acted on the understanding that subsection (b)(1) applies only to acting officers temporarily filling a vacancy pursuant to subsection (a)(1). *See* Cert. Pet. 4-7. The Senate, having been fully informed of those Presidential actions, consistently acquiesced in the Presidents' interpretation of the FVRA. *Ibid.* Very recently, however, the D.C. and Ninth Circuits have rejected that long-standing interpretation and held that subsection (b)(1) applies to acting officers temporarily filling vacancies pursuant to any of the methods provided by FVRA § 3345.

The decision below – and the Ninth Circuit decision following it – rests entirely on a close textual analysis of FVRA § 3345. That textual analysis does not withstand scrutiny. Rather, as we now show, the interpretation of the FVRA by the elected branches with direct responsibility for appointing and confirming Executive officers – i.e., the President and the Senate – is the interpretation dictated by the statutory text.

A. The core of FVRA § 3345 is subsection (a)(1). Subsection (a)(1) provides that whenever "an officer of an Executive agency," whose appointment to office was made by the President with the advice and consent of the Senate, "dies, resigns or is otherwise unable to perform the functions and duties of the office[,] the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." In other words, subsection (a)(1) provides that the normal course

whenever a vacancy occurs in such an Executive office is that "the first assistant to the office" automatically will be charged with "perform[ing] the functions and duties of the office temporarily."[2]

The remaining subsections of FVRA § 3345 – i.e., subsections (a)(2), (a)(3), (b)(1), and (c)(1) – state a variety of exceptions to the normal course of temporary succession provided by subsection (a)(1). Each of those subsections begins with the phrase "[n]otwithstanding subsection (a)(1)" or the equivalent phrase "notwithstanding paragraph (1)." Each time the phrase appears, it serves to indicate an exception to subsection (a)(1) and only to subsection (a)(1).

1. Subsections (a)(2), (a)(3), and (c)(1) each provide that the President "may direct" someone other than the "first assistant to the office" to temporarily perform the functions and duties of the vacant Executive office. Subsection (a)(2) provides that "the President . . . may direct a person who serves in an office for which appointment is required to be made by the President by and with the advice and consent of the Senate, to perform the functions and duties of the va-

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[2] It bears emphasis that "the first assistant to the office" authorized to "perform the functions and duties of the office temporarily" pursuant to subsection (a)(1) can be a person appointed to the first assistant position after the office-holder becomes unable to perform the functions of the office. This is pertinent to understanding the later reference in subsection (b)(1)(A)(i) to a person who "during the 365-day period preceding" the vacancy "did not serve in the position of the first assistant to the office." As we discuss later in point D, this created some confusion in the court below.

cant office." Subsection (a)(3) provides that "the President . . . may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office," provided that the officer or employee held a high level position in the agency for at least 90 days "during the 365-day period preceding the date of the [vacancy]." And, subsection (c)(1) provides that "the President . . . may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive Department . . . without a break in service, to continue to serve in that office subject to the same time limitations" that apply to all temporary successions provided for by FVRA § 3345.

A temporary assignment made by the President using one of the three methods provided for in subsections (a)(2), (a)(3) and (c)(1) displaces the automatic succession provided for in subsection (a)(1). To make the displacement clear, each of these subsections begins by stating that its method of appointment applies "notwithstanding" the method of appointment provided for by subsection (a)(1). In each subsection, the "notwithstanding" phrase indicates that, where applicable, the provisions of the subsection in question supersede the provisions of subsection (a)(1).

2. Subsection (b)(1) provides a fourth exception to subsection (a)(1), this one limiting the service of a first assistant. Subsection (b)(1) states that, "[n]otwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section" if "the President submits a nomination of such person to the Senate for appointment to such of-

fice." Subsection (b)(1) further states that this general prohibition does not apply where the person has "served in the position of first assistant to the office of such officer" for at least 90 days "during the 365-day period preceding the date of the [vacancy]." Subsection (b)(2) provides an exception to the prohibition where the first assistant position required appointment by the President and confirmation by the Senate and the person has met those requirements.

Just like subsections (a)(2), (a)(3) and (c)(1), subsection (b)(1) supersedes the appointment process provided by subsection (a)(1). And, just like subsections (a)(2), (a)(3) and (c)(1), subsection (b)(1) begins with the phrase "[n]otwithstanding subsection (a)(1)" to indicate that the exception stated therein supersedes only subsection (a)(1) and not the various alternative appointment processes provided for by the other subsections.

If subsection (b)(1) were intended to place a limitation on the appointment processes other than the one started in subsection (a)(1), it would not have begun with the phrase "[n]otwithstanding subsection (a)(1)." Without that qualifying phrase, subsection (b)(1) could be read as stating a categorical prohibition on any person serving as an acting officer pursuant to FVRA § 3345 once the person has been nominated for appointment to the office.[3] But sub-

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[3] A categorical prohibition on someone temporarily filling a vacancy once he or she has been nominated would nullify subsection (c)(1), which allows the President to direct a person who has been nominated for reappointment to continue to serve on a temporary basis following the expiration of his or her term. We will return to this point later in point C.

section (b)(1) does begin with the limitation "Notwithstanding subsection (a)(1)," and the only way the subsection can be read to state a categorical prohibition is by ignoring the limitation with which it begins.

The D.C. Circuit correctly observes that the phrase "notwithstanding subsection (a)(1)" can be read to mean "in spite of subsection (a)(1)," "in derogation of subsection (a)(1)," or "superseding subsection (a)(1)." Pet. App. 13a-14a. These are all various ways of saying the same thing – that the provision in question derogates from and supersedes subsection (a)(1). When subsections (a)(2), (a)(3) and (c)(1) begin this way, it clearly means that the alternative appointment method provided for in the particular subsection derogates from or supersedes the usual appointment method provided for in subsection (a)(1). And when subsection (b)(1) begins this way, it just as clearly means that the limitations on a first assistant temporarily filling an Executive office stated therein supersede the first assistant's assignment pursuant to subsection (a)(1).

3. The D.C. Circuit's principal ground for disregarding the phrase "[n]otwithstanding subsection (a)(1)" is that "[t]he first independent clause of subsection (b)(1) . . . states that '*a person* may not serve as an acting officer for an office under *this section*.'" Pet. App. 12a (court's emphasis). But the court's analysis of that clause does not stand up to scrutiny.

The court of appeals found it especially significant that the clause uses the word "person," rather than the term "first assistant," because "[t]he term 'a person' is broad; it covers the full spectrum of possible candidates for acting officer." Pet. App. 12a. In context,

however, it is apparent that Congress used the term "person," because subsection (b)(1) refers to an individual both in his or her capacity as a first assistant temporarily filling an office and in his or her capacity as a nominee to permanently fill the same office. The core of subsection (b)(1) is the prohibition that "a *person* may not serve as an acting officer for an office under this section if . . . the President submits a nomination of *such person* to the Senate for appointment to such office." A reference to the President submitting "a nomination of such first assistant" would be confusing, and perhaps nonsensical. Hence the use of the term "person," which allows reference to the person in both of their capacities – as an acting officer and as a nominee.

The court of appeals also found it significant that the clause refers to "serv[ing] as an acting officer *under this section*," while other provisions in the FVRA are "precise in [their] use of internal cross-references." Pet. App. 12a (court's emphasis). Ironically, most of the "precise . . . internal cross-references" cited by the court below are the "[n]otwithstanding subsection (a)(1)" clauses that the court treats as completely insignificant. Subsection (b)(1) refers to persons "serv[ing] as an acting officer under this section" to indicate that it does not apply to persons who are serving under another "statutory provision [that] expressly" provides other means to "designate[] an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. § 3347(a)(1).

B. The exceptions to subsection (b)(1)'s prohibition on any person temporarily performing the func-

tions of an office to which he or she has been nominated provide additional strong indication that the subsection applies only to persons serving pursuant to subsection (a)(1). Both of the exceptions apply only to a person who is temporarily acting pursuant to his or her status as a first assistant. The first exception allows someone who served as a first assistant for at least 90 days during the 365 day period preceding the date of the vacancy to temporarily perform the functions of an office he or she has been nominated to fill. 5 U.S.C. § 3345(b)(1)(A). The second exception allows a first assistant whose appointment required nomination by the President and confirmation by the Senate to temporarily perform the functions of the office he or she has been nominated to fill. 5 U.S.C. § 3345(b)(2). Thus, both of the exceptions apply only to persons who are serving temporarily by virtue of having been the first assistant to the office in question. In other words, both exceptions apply only to persons who are temporarily performing the functions of a vacant office pursuant to subsection (a)(1).

It is also significant that each of the two exceptions to the general prohibition in subsection (b)(1) add qualifications that are parallel to qualifications required for temporary appointments under subsections (a)(2), (a)(3) and (c)(1). The first (b)(1) exception allows a first assistant to temporarily perform, pursuant to subsection (a)(1), the functions of an office to which he or she has been nominated if he or she held the position of first assistant for at least 90 days during the 365-day period preceding the date of the vacancy. This parallels the 90 day service requirement for persons appointed to temporarily perform the

functions of a vacant office pursuant to subsection (a)(3). The second (b)(1) exception allows a first assistant who has been appointed to that position by the President and confirmed by the Senate to temporarily perform the functions of the vacant office pursuant to subsection (a)(1). This parallels the requirements of subsections (a)(2) and (c)(1), which allow the President to appoint someone who has been confirmed by the Senate for the position at issue or for another office to serve temporarily.

In sum, the logic of subsection (b) is that a first assistant can continue to temporarily perform the functions of an office he or she has been nominated to fill only if the person served as the first assistant for 90 days during the 365-day period preceding the date of the vacancy or was appointed to the first assistant position by the President and confirmed by the Senate. In other words, while the normal course is for the first assistant to temporarily perform the functions of the vacant office pursuant to subsection (a)(1), if the President nominates the first assistant to fill the office, the nominee can continue to temporarily perform those functions only if he or she meets the sort of conditions that are required for temporary assignment under one of the other subsections.

The obvious purpose of subsection (b)(1) is to prevent the President from immediately installing a nominee for an office requiring Senate confirmation, who is neither a high-ranking career employee of the agency nor already a Senate-confirmed appointee, through the device of simultaneously submitting the nomination and appointing the nominee to be first assistant to the office. There is nothing to indicate that

subsection (b)(1) was intended to prevent the President from, as occurred here, directing a high-ranking career employee (or a Senate-confirmed officeholder) to temporarily perform the functions of a vacant office and then nominating that employee to permanently fill the office.

C. Reading subsection (b)(1) to apply to temporary appointments made pursuant to subsections other than (a)(1) brings subsection (b)(1) into conflict with subsection (c)(1). Subsection (c)(1) provides that "the President . . . may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive Department . . . without a break in service, to continue to serve in that office subject to the same time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die." However, subsection (b)(1) states that "a person may not serve as an acting officer for an office under this section, if . . . the President submits a nomination of such person to the Senate for appointment to such office." Thus, subsection (b)(1), were it applicable, would expressly prohibit what subsection (c)(1) expressly permits.

A person directed to continue in office pursuant to subsection (c)(1) clearly "serve[s] as an acting officer" within the meaning of FVRA § 3345. In the first place, "the expiration of a term of office" – the situation addressed by subsection (c)(1) – is expressly treated as "an inability to perform the functions and duties of such office." 5 U.S.C. § 3345(c)(2). And, the title to FVRA § 3345 indicates anyone temporarily performing the duties and functions of an office under that

section – including pursuant to subsection (c)(1) – is an "acting officer." What is more, the "time limitations in section 3346," which apply to all temporary appointments under section 3345, including temporary appointments pursuant to subsection (c)(1), apply to any "person serving as an *acting officer* as described under section 3345." 5 U.S.C. § 3346(a) (emphasis added).

The two exceptions to subsection (b)(1) do not serve to harmonize that provision with subsection (c)(1). Someone who actually held the office in question would almost certainly not have been the first assistant to that office for any substantial period of time during the 365 day period preceding the expiration of his or her term. And, by definition, a person directed to continue performing the functions of an office pursuant to subsection (c)(1), while his or her nomination for reappointment is pending, does not meet the second exception to (b)(1) of serving as a Senate-confirmed first assistant to that office. Thus, a person directed to temporarily serve pursuant to subsection (c)(1) could not satisfy either of the exceptions to subsection (b)(1).

The only way to avoid bringing subsection (b)(1) into direct conflict with subsection (c)(1) is to give effect to the phrase "[n]otwithstanding subsection (a)(1)" by construing subsection (b)(1) to apply only to persons serving as acting officers pursuant to subsection (a)(1).

D. Neither of the textual objections raised by the circuit courts to reading subsection (b)(1) as applying only to temporary service pursuant to subsection (a)(1) withstands scrutiny.

The first textual objection is that if subsection (b)(1) applies only to temporary service pursuant to subsection (a)(1), then the reference in subsection (b)(1)(A)(i) to "serv[ice] in the position of first assistant to the office of an officer described under subsection (a) . . . during the 365 day period preceding the date of the [vacancy]" is redundant, since all persons serving pursuant to subsection (a)(1) will have met this requirement. Pet. App. 16a. However, as the court below recognized, this provision is redundant only if subsection (a)(1) applies only to persons who are incumbent first assistants on the date the vacancy first occurs. *Ibid.* In fact, subsection (a)(1) is not limited to first assistants holding that position on the date the vacancy occurs. By its terms, subsection (a)(1) would allow a first assistant appointed after the date of the vacancy – i.e., a first assistant who had not held that position "during the 365 day period preceding the date of the [vacancy]" – to temporarily perform the duties and functions of the vacant office.

The second textual objection is that reading subsection (b)(1) to apply only to temporary service pursuant to subsection (a)(1) would make redundant subsection (b)(2)(A)'s requirement of "servi[ce] as the first assistant to the office of an officer described under subsection (a)." Pet. App. 16a. But subsection (b)(2)(A) does not stand alone and thus does not state a separate requirement. Rather, subsection (b)(2)(A) states one part of a single three-part requirement: (A) that the person serve as the first assistant, (B) that the first assistant position so held require Presidential appointment and Senate confirmation, and (C) that the person in question was actually appointed to the first assistant position and confirmed by the Senate. This

three-part requirement could have been written as a single sentence without the lettered subdivisions: "such person is serving as the first assistant having met the requirements of being appointed to that position by the President and confirmed by the Senate." Limiting subsection (b)(1) to persons serving pursuant to subsection (a)(1) does not make this three-part requirement redundant.

* * *

The President and the Senate have – over the two decades since the enactment of the Federal Vacancies Reform Act – correctly proceeded on the understanding that subsection (b)(1) applies only to acting officers serving pursuant to subsection (a)(1).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further consideration on the merits.

Respectfully submitted,

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In the Supreme Court of the United States

National Labor Relations Board,
Petitioner,

v.

SW General, Inc.,
Doing Business as Southwest Ambulance,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

All presidential appointments must be made with the "Advice and Consent of the Senate," unless Congress waives that power and authorizes an appointment by "the President alone." U.S. Const. art. II, § 2, cl. 2. May such a unilateral appointment be made in the absence of a clear statement by Congress waiving advice and consent?

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5 U.S.C. § 3345(a)(2) 30

5 U.S.C. § 3345(a)(3) 30

5 U.S.C. § 3345(b)(1) 30

5 U.S.C. § 3347(a) 15

5 U.S.C. § 3347(a)(1)(A) 29

Act of Feb. 13, 1795, ch. 21, 1 Stat. 415. 13

Act of July 23, 1868, ch. 227, 15 Stat. 168 14

Act of May 8, 1792, ch. 37, 1 Stat. 281 12

U.S. Const. art. II, § 2, cl. 2 3

Other Authorities

144 Cong. Rec.:

(daily ed. June 16, 1998)

Page S6,414 ..... 29, 33

(daily ed. Sept. 28, 1998)

Page S11,025 33

(daily ed. Oct. 21, 1998)

Page S12,767 33

Page S12,824 15

2 Op. O.L.C. 113 (1978). 8

6 U.S. Op. Atty. Gen. 1 (1853) 6

15 U.S. Op. Atty. Gen. 3 (1875) 26

15 U.S. Op. Atty. Gen. 449 (1878) 26

16 U.S. Op. Atty. Gen. 596 (1880) 7

17 U.S. Op. Atty. Gen. 530 (1883) 7

17 U.S. Op. Atty. Gen. 532 (1883) 7

18 U.S. Op. Atty. Gen. 58 (1884) 7

18 U.S. Op. Atty. Gen. 98 (1885) 7, 8

18 U.S. Op. Atty. Gen. 409 (1886) 26, 27

19 U.S. Op. Atty. Gen. 503 (1890) 27

20 Op. O.L.C. 124 (1996) 8

20 U.S. Op. Atty. Gen. 8 (1891) 7

27 U.S. Op. Atty. Gen. 337 (1909) 27-28

28 U.S. Op. Atty. Gen. 95 (1909) 27

Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 Harv. J. L. & Pub. Pol'y 103 (2005) 25

Black's Law Dictionary (10th ed. 2014) 31

Brannon P. Denning, *Article II, the Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 Wash. U. L.Q. 1039 (1998) 11

Cong. Globe, 40th Cong., 2d Sess. (1868) 14

Elliot's Debates (Jonathan Elliot ed., 1861) 23

Farrand's Records: The Records of the Federal Convention of 1787 (Max Farrand ed., 1911) 22, 23

The Federalist No. 76 (Alexander Hamilton) (Clinton Rossiter ed., 1961)..... 22

The Federalist No. 82 (Alexander Hamilton) (Clinton Rossiter ed., 1961)..... 17

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) 18

Laurence H. Tribe, American Constitutional Law (2d ed. 1988) 19

Lois Reznick, *Temporary Appointment Power of the President*, 41 U. Chi. L. Rev. 146 (1973) 3, 4

Memorandum for Neil Eggleston, Associate Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of an Acting Staff Director of the United States Commission on Civil Rights* (Jan. 13, 1994) 8-9

Oxford English Dictionary (2d ed. 1989) 31

United States Government Policy and Supporting Positions (Plum Book) 2012 24-25

William Loughton Smith, *Alteration in the Treasury and War Departments, Communicated to the House of Representatives, Feb. 29, 1792*, American State Papers: Miscellaneous 12-13

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. This case interests Cato because it concerns how courts approach statutes that purportedly waive the Senate's advice-and-consent role, a core check-and-balance mechanism in our separation of powers.

SUMMARY OF ARGUMENT

The Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345–3349, authorizes the president to make appointments of "acting" officers, without the Senate's advice and consent, when vacancies arise in certain offices. These "acting" officers have as much power as their permanent counterparts, but can only stay on the job for a limited time, during which Congress and the president can (hopefully) find someone mutually agreeable for the permanent position.

This case is a dispute about whether the text of the FVRA authorized the appointment of Lafe Solomon as acting general counsel of the National Labor

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[1] Rule 37 statement: All parties received timely notice of amicus's intent to file this brief; their consent letters have been lodged with the Clerk. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than amicus funded its preparation or submission.

Relations Board (NLRB). But it is about more than a narrow question of statutory interpretation. This case is about what type of thing the FVRA *is*, and how that colors the way courts should interpret it.

Put simply, the FVRA is a congressional waiver of advice and consent, as permitted by the Constitution's "Excepting Clause." It vests the appointment of limited-tenure officers in "the President alone." It thus alters the default rule, which is that the Senate serves as a check on the executive's appointments. This fact illuminates how the Court should approach textual disputes concerning the validity of unilateral appointments.

When this Court confronts statutes that purportedly alter the government's balance of power—whether between the states and the federal government or between federal branches—the Court does not treat both sides of a textual argument with equal weight. Instead, balance-of-power concerns require that the reading of a statute that would *alter* the traditional balance must be supported by a "clear statement" of legislative intent. Put simply, even if a statute is ambiguous—which the FVRA is not—the tie must go to the default balance our Framers designed.

Applying this approach to the case at hand makes the necessary result clear. Advice and consent is undoubtedly a core component of the balance of powers between the executive and legislative branches, as this court has frequently recognized. And Congress did not, in the FVRA, make a "clear statement" that appointments such as that of Lafe Solomon could bypass advice and consent. This Court should err on the side of the accountability that comes from the two-branch appointment process, just as the Framers did

in designing the Appointments Clause. For this reason, this unilateral appointment should be held invalid, and the D.C. Circuit ruling affirmed.

ARGUMENT

I. THE PRESIDENT HAS NO POWER TO MAKE TEMPORARY, NON-RECESS APPOINTMENTS OUTSIDE OF THOSE AUTHORIZED BY STATUTE

A. The Text and Purpose of the Appointments Clause Show as Much

The Appointments Clause declares that the president

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

Under the plain text of this clause, "the President is given express authority to make appointments without the advice and consent of the Senate in only two instances—where Congress has by law given this right to the President and where a vacancy occurs while the Senate is in recess." Lois Reznick, *Temporary Appointment Power of the President*, 41 U. Chi. L. Rev. 146, 148 (1973). Not only does the clause lack any other *express* grant of appointment power, but the structure of the clause also excludes

> any implied powers of appointment, in particular any implied power to make temporary appointments to insure the smooth flow of governmental functions pending submission of a nomination to the Senate. If the President had such power, the recess vacancy clause would be mere surplusage. . The recess vacancy clause thus compels rejection of an implied temporary appointment power.

Id.

The last portion of the Appointments Clause, known as the "Excepting Clause," provides further evidence that no such inherent power exists. This clause gives Congress the option, if it chooses, of vesting the appointments of particular officers in "the President alone." Although almost no debate occurred at the Constitutional Convention concerning the Excepting Clause, this Court has recognized that the clause's "obvious purpose is administrative convenience." *Edmond v. United States*, 520 U.S. 651, 660 (1997). The Framers included the Excepting Clause "foreseeing that when offices became numerous and sudden removals necessary, [advice and consent] might be inconvenient" in particular circumstances. *United States v. Germaine*, 99 U.S. 508, 510 (1878). But if the president could make unilateral temporary appointments for the sake of administrative convenience *without* statutory authorization, the Excepting Clause, like the Recess Appointments Clause, would be surplusage; it would authorize Congress to give the president a power he already has.

Finally, the Appointments Clause leaves no room for the concept of an "acting officer" who is not a constitutional officer at all, and thus need not be ap-

pointed under the Appointments Clause. As the Court has said, "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). Acting officers, while they serve as such, exercise just as much authority as permanent officers. And the Court has recognized that where such significant authority is exercised, even appointments to explicitly time-limited offices must still be made in accordance with the Appointments Clause. *See id.* at 132 ("No class or type of officer is excluded [from the Appointments Clause] because of its special functions."). Thus, any argument that "acting officers" need *not* be appointed pursuant to the Appointments Clause merely because their tenure is limited would be in severe tension with this Court's precedent.

The best view of both the original Vacancies Act and the FVRA, then, is that "acting" officials are "inferior officers,"[2] and that the FVRA derives its constitutionality from Congress's power to vest the appointment of inferior officers in "the President alone." The FVRA does not *take away* any emergency appointment power that the president would otherwise have; it instead *grants* additional power, which the president can only wield when it is given by statute.

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[2] Although some officers covered by the FVRA are considered principal officers when acting in a permanent capacity, the time-limited nature of acting officers plausibly makes them inferior officers. This court has held that "limited tenure" is one of the factors tending to indicate that an officer is inferior rather than principal. *See Morrison v. Olson*, 487 U.S. 654, 672 (1988).

B. For Over 100 Years, the Executive Branch Consistently Agreed

Until the last 40 years, when controversies between the executive and legislative branch began to grow more heated (and more litigious), the executive branch's interpretation of its temporary appointment power had consistently accorded with that of the plain text of the Appointments Clause. Going as far back as 1853, and for over 100 years, the attorney general repeatedly advised the president that in the absence of express statutory authority, *all* appointments must be made with the advice and consent of the Senate, including temporary appointments.

The foundational opinion in this sequence occurred during the Pierce administration, when a statute creating the new office of "assistant secretary of state" was silent as to the method of that officer's appointment. Asked whether, in this situation, the new officer could be appointed by the president alone or the secretary of state, Attorney General Caleb Cushing gave the following view of the structure of the Appointments Clause:

> Of course, without there be [sic] express enactment to the contrary . the appointment of any officer of the United States belongs to the President, by and with the advice and consent of the Senate. As there is no such express exceptional enactment in the present case, I think the Assistant Secretary of State must be nominated to the Senate by the President.

6 U.S. Op. Atty. Gen. 1, 1 (1853).

After the passage of the Vacancies Act in 1868, the attorneys general expanded this reasoning to the

realm of *temporary* appointments, definitively holding that no appointment power existed beyond the Act's authorization. In 1880, after the Senate had failed to fill a vacancy in the office of secretary of the navy for ten days (then the statutory length of tenure for acting officers), President Hayes asked Attorney General Charles Devens whether he could make a second acting appointment to that office for an additional period of ten days. Devens responded that

> the vacancy in the office of Secretary of the Navy . cannot be filled by designation of the President beyond the period of ten days. This power of the President is a statutory power, and we must look to the statute for its definition. . *The statutory power being exhausted, the President is remitted to his constitutional power of appointment.*

16 U.S. Op. Atty. Gen. 596, 597 (1880) (emphasis added). *See also* 17 U.S. Op. Atty. Gen. 530 (1883) (likewise advising that temporary appointments are limited to 10 days); 18 U.S. Op. Atty. Gen. 58 (1884) (same); 20 U.S. Op. Atty. Gen. 8 (1891) (same).

Later, in two separate opinions, Attorney General Benjamin H. Brewster advised that even where a statute *formerly* vested nomination in the president alone or in a department head, advice and consent is still necessary when an updated version of the statute is silent as to the appointment method. *See* 17 U.S. Op. Atty. Gen. 532 (1883) (treasury secretary can no longer appoint assistant engineers in the revenue-cutter service after revised statute eliminated appointments language); *see also* 18 U.S. Op. Atty. Gen. 98 (1885) (treasury secretary can no longer appoint assistant collector at the port of New York for

same reason). In both opinions, Brewster emphasized the necessity of current and explicit statutory authorization for appointments without advice and consent:

> [W]ithout any statutory provision on the subject of appointment . . the general rule which is deducible from [the Appointments Clause] becomes applicable to and controls the question under consideration, namely, that the appointment of all officers of the United States belongs to the President, by and with the advice and consent of the Senate, where the appointment thereof is not otherwise provided for in the Constitution itself or by legislative enactment.

18 U.S. Op. Atty. Gen. 98, 98 (1885).

It is only recently, as relations between the branches have grown more acrimonious, that the executive branch's legal interpretation has begun to hedge toward an interpretation more favorable to its own powers. In 1978, the Office of Legal Counsel advised that without statutory authority "the reasonableness of a given interim appointment should be measured not by a per se rule but by a variety of pragmatic factors." 2 Op. O.L.C. 113, 118 (1978). More recently, during the height of a highly partisan battle over appointments to the U.S. Commission on Civil Rights (and in a decade when the president had twice argued in court that temporary appointments were authorized by the Take Care Clause, *see, e.g.*, *George v. Ishimaru*, 849 F. Supp. 68, 71 (D.D.C. 1994), an OLC official went so far as to argue that "the Vacancies Act constitutes a restriction on the President's authority, as opposed to a source of power." *See* 20 Op. O.L.C. 124, 164 (1996) (quoting Mem-

orandum for Neil Eggleston, Associate Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of an Acting Staff Director of the United States Commission on Civil Rights* at 3 (Jan. 13, 1994)).

Even though a contrary interpretation would often have been of great use to the executive branch, for over 100 years the office of the attorney general advised against any inherent power of unilateral appointment, temporary or otherwise. Given the more frequent litigation over temporary appointments in recent decades, it should not be surprising that OLC opinions have begun to look more favorably on such a power. Instead, the Court should put greater weight on the fact that a long line of attorneys general, examining our constitutional structure dispassionately, were willing to tell their own president that a power he would have liked to wield simply didn't exist.

C. And the Courts Have Too

When confronted with attempts by the president to make appointments—even *acting* appointments—without statutory authority, courts have consistently rejected the premise that such a power exists. One of the earliest such cases came in 1823, when none other than Chief Justice John Marshall, sitting as circuit justice, held that the president's general duty to "take care that the laws be faithfully executed" did not give him the power to unilaterally create an office and appoint an officer to it. *See United States v. Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747). Marshall rejected the proposition that any type of officer existed which need not be appointed pursuant to the Appointments Clause. The Excepting Clause in particular, he wrote, "indicates an opinion in the framers of

the constitution, that they had provided for all cases of offices." *Id.* at 1213. Marshall thus held the unilateral appointment in question to be invalid, *id.* at 1218, and affirmed that *all* appointments must be made with the advice and consent of the Senate unless otherwise provided for by law, *id.* at 1213–14.

More recently, the District Court for the District of Columbia confronted a case that—like this one—concerned the validity of a temporary appointment made under the Vacancies Act. *See Williams v. Phillips*, 360 F. Supp. 1363 (D.D.C. 1973), Motion for Stay Pending Appeal denied, 482 F.2d 669 (D.C. Cir. 1973) (per curiam). President Nixon had appointed Howard Phillips to be Acting Director of the Office of Economic Opportunity (OEO), *id.* at 1366, but the terms of the Vacancies Act did not expressly encompass appointments to the OEO, *id.* at 1370. Phillips, like Maurice 140 years earlier, argued that the president had appointed him under his general Take Care Clause powers and that he therefore did not need statutory authorization. *Id.* at 1367

The court rejected this argument, holding the appointment to be invalid and enjoining Phillips from acting as director of the OEO. *Id.* at 1371. As the court noted, the view that the president has some inherent temporary appointment power is in conflict with the 200-year-old practice of Congress of authorizing *particular* temporary appointments by statute: "If the President has an inherent (or more properly, derivative) power to make temporary appointments of federal officers then the Vacancies Act would be unconstitutional." *Id.* at 1369. The court recognized instead that "[t]he vacancies statutes . . . are clear examples of the vesting by the Congress of an appoin-

tive power in the President or Department head alone that would not otherwise exist. Congress has merely exercised the power conferred upon it by the Constitution." *Id.* at 1371. Thus, "in the absence of legislation vesting a temporary power of appointment in the President, the constitutional process of nomination and confirmation must be followed." *Id.*

Seventeen years later, the same court reached the same conclusion. *See Olympic Fed. Sav. & Loan Ass'n v. Dir., Office of Thrift Supervision*, 732 F. Supp. 1183 (D.D.C. 1990), appeal dismissed as moot and case remanded, 903 F.2d 837 (D.C. Cir. 1990) (per curiam). President George H.W. Bush had appointed Salvatore Martoche to be Acting Director of the Office of Thrift Supervision, but the court found that the appointment was not authorized under the Vacancies Act. *Id.* at 1199. With the statutory authorization held invalid, the *Olympic* court once again rejected the Take Care Clause argument. The court noted that if the president held such a power, the Vacancies Act would be either meaningless surplusage or an unconstitutional limitation on presidential power, and that it was "not inclined to hold that the Vacancies Act, relied on by all branches of the government for more than 100 years, is and always has been unconstitutional." *Id.* at 1200 (citations omitted).

As one scholar summarized, "courts have consistently rejected the proposition that the President may evade the Appointments Clause by claiming an inherent power to fill vacancies under the so-called 'Take Care Clause.'" Brannon P. Denning, *Article II, the Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 Wash. U. L.Q. 1039, 1042 (1998). Although not binding precedent, these

opinions are highly persuasive, particularly as to the place of the Vacancies Acts in our constitutional structure. If the FVRA *grants* the president additional powers, its authority is found in the Excepting Clause. But if the FVRA were instead imagined to *take away* a preexisting and inherent presidential power, identifying the constitutional authority for such an abrogation would be very hard indeed.

D. As Did Congress

The mere fact that Congress has enacted a Vacancies Act—as well as several comprehensive revisions to that act—suggests that Congress believes its own authorization to be necessary for any unilateral temporary appointments. The Second Congress, which comprised many people who had signed or ratified the Constitution itself, demonstrated this view just three years after the government was first established. In 1792, Congress passed an act declaring that in the case of a vacancy in any office

> whose appointment is not in the head [of that office's department], . . it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons at his discretion to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease.

Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281.[3]

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[3] The Second Congress as a whole added the Act's grant of temporary appointment power during the amendment process, a power that had not been included in the original draft written in committee. *See* William Loughton Smith, *Alteration in the Treasury and War Departments, Communicated to the House of*

Unlike later statutes authorizing temporary appointments, this grant of appointment power did not come with any limit on the tenure of these appointments, meaning its enactors could not have possibly intended the statute as a *limitation* on some preexisting presidential appointment power.[4] This strongly suggests that a majority of the Second Congress believed the power would *not* have existed at all without the Act's passage.

Moreover, the exclusion of officers appointed by the "heads of departments" from the grant of presidential appointment power clearly implies that the Second Congress had the Excepting Clause in mind when drafting the statute, specifically its three potential repositories of the appointment power ("in the President alone, in the Courts of Law, or in the Heads of Departments"). Congress had already vested some appointments in the heads of departments in order to aid administrative efficiency, and was now vesting other—temporary—appointments in "the President alone" for the same purpose.

The text and debates concerning the first Vacancies Act, passed in 1868, show the same understanding in the 40th Congress as there was in the Second

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Representatives, Feb. 29, 1792, 1 American State Papers: Miscellaneous 46–47 (original draft, proposing a cumbersome system of succession to fill vacant offices within each department, §§ 8–11, and not providing for any presidential power of temporary appointment). This fact only increases the interpretive weight of the Act's grant of temporary appointment power, as it reflected the views of a majority of the Second Congress.

[4] It was only three years later, in 1795, that the statute was amended so that "no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months." Act of Feb. 13, 1795, ch. 21, 1 Stat. 415.

Congress. Members of Congress frequently referred to the Act as a bill "to *authorize* the temporary supply of vacancies in the Executive Departments." *See, e.g.*, Cong. Globe, 40th Cong., 2d Sess., 4025 (1868) (statement of Sen. Trumbull) [hereinafter Globe]; *see also id.* at 1769 (statement of Rep. Wilson). The term "authorize" was likewise used in the text of the act itself.[5] When introducing the bill, Senator Trumbull described it as providing that "it shall be *lawful* for the President" to make certain temporary appointments up to 10 days. Globe at 1163 (emphasis added). And like the Second Congress, the 40th also included the phrase "it shall be lawful" in the text of the bill itself. *See* 1868 Vacancies Act § 3.

Had Congress believed that the Act was *constraining* some preexisting power of temporary appointment, it would have been more natural to describe it as making *unlawful* any temporary appointments *beyond* 10 days. But this terminology was never used; Congress consistently referred to the Act as an *authorization* and never as a *restraint*. Additionally, the Act repealed, by its own terms, all prior laws "which *empower* the President to authorize any persons" to act as temporary officials—1868 Vacancies Act § 4 (emphasis added)—which strongly suggests that Congress viewed such prior acts as *granting* the president a new power he would not otherwise have had.

Most recently, in enacting the FVRA of 1998, Congress attempted to put an end to the executive

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[5] The Act provided, "[t]hat nothing in this act shall *authorize* the supplying as aforesaid a vacancy for a longer period than ten days when such vacancy shall be occasioned by death or resignation." Act of July 23, 1868, ch. 227, 15 Stat. 168 § 3 (emphasis added) [hereinafter 1868 Vacancies Act].

branch's practice of using general-purpose statutes as justification for temporary appointments. The FVRA declares that, apart from other statutes that *explicitly* authorize temporary appointment power, it is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of" positions requiring Senate advice and consent. 5 U.S.C. § 3347(a). As one of the bill's primary sponsors explained, this language was included so that "general 'housekeeping' statutes . . . shall not be construed as providing an alternative means of filling vacancies." 144 Cong. Rec. S12,824 (daily ed. Oct. 21, 1998) (statement of Sen. Byrd). Once again, the premise upon which all of the drafters of the FVRA clearly operated was that temporary appointments could only be authorized by *other statutes*. Congress, then and now, has had it right: The appointment power granted to the president by statute and the total appointment power of the president are one and the same.

II. COURTS SHOULD INTERPRET STATUTES PURPORTEDLY WAIVING "ADVICE AND CONSENT" UNDER A CLEAR STATEMENT STANDARD

The FVRA, as permitted by the Excepting Clause, alters the default constitutional rule of appointments, allowing certain temporary appointments to bypass the advice-and-consent procedure that would be necessary in the absence of an express statute. The dispute in this present case is whether the language of the FVRA authorizes a particular type of temporary appointment. In other words, the question at issue is whether Congress affirmatively and unambiguously waived the Senate's right to advice and consent in the case of a particular type of temporary appointment.

Previous cases before this Court have concerned whether Congress had the *power* to waive advice and consent under the Excepting Clause, dealing with such issues as whether a particular officer was "inferior"—*see, e.g.*, *Morrison*, 487 U.S. at 654—or whether a designated appointer was a "Head of Department" or "Court of Law"—*see, e.g.*, *Freytag v. Comm'r*, 501 U.S. 868 (1991). But this case represents the first time the Court has been called on to interpret whether Congress *intended* to waive advice and consent. This calls for some consideration of how statutes granting the president limited unilateral appointment powers should be interpreted. And the answer is clear from the Court's previous cases concerning equally serious alterations of default constitutional rules: Since waiving advice and consent alters a balance of power between branches of government that was designed to be the default equilibrium, the Court

should continue its practice of holding such alterations to a clear-statement standard of explicitness.

A. Statutes That Alter Default Balances of Power Are Interpreted under a Clear-Statement Standard

When our constitutional design shows a preference for a default balance of power, this Court requires a high degree of statutory clarity before ruling that a legislature intended to alter that default balance. This principle has been applied most frequently in disputes between the federal government and the states.[6] The Court has explained the reason for the clear-statement standard: "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971). Thus, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.* As the Court reiterated 20 years later, "[w]hen the Federal

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[6] Support for applying a clear-statement rule in state-federal relations has a distinguished pedigree. Alexander Hamilton himself recommended that the default rule of concurrent state and federal jurisdiction only be overruled by a clear statement:

> When we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union *where it was not expressly prohibited*.

The Federalist No. 82, at 492 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (italics added, caps in original).

Government . radically readjusts the balance of state and national authority, those charged with the duty of legislating must be reasonably explicit." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539–40 (1947) (internal quotations and alterations omitted).

In protecting this federal balance, the Court has been at its most strict when interpreting state statutes that purportedly waive a state's *own* rights against the federal government. In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the Court declined to hold that a state had waived its immunity from suit in federal court "[i]n the absence of an unequivocal waiver specifically applicable to federal court jurisdiction." *Id.* at 241. The Court thus affirmed a clear-statement rule going forward:

> because the Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States . a State will be deemed to have waived its immunity "only where stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction."

Id. at 239–40 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)) (internal alterations and quotation omitted).

The Court has taken a similar approach when interpreting *federal* statutes that purportedly encroach upon core state governmental functions, and thereby "upset the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460

(1991). Although that balance can be altered by means of "intrusive exercises of Congress' Commerce Clause powers," the Court "must be absolutely certain that Congress intended such an exercise" and thus will never "'give the state-displacing weight of federal law to mere congressional *ambiguity*.'" *Id.* at 464 (quoting Laurence H. Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988)). Instead, "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Putting this high standard to effect, the Court has held that to read a federal statute as superseding a state's own law on the eligibility of state judges, Congress must have "made it clear that judges are *included*. . [I]t must be plain to anyone reading the Act that it covers judges." *Gregory*, 501 U.S. at 467. Similarly, although Congress has the power to "abrogate the States' constitutionally secured immunity from suit in federal court" and thereby alter "the usual constitutional balance between the States and the Federal Government," it may do so "only by making its intention unmistakably clear in the language of the statute." *Atascadero*, 473 U.S. at 242. For this reason, the Court refused to read a federal statute as compelling states to entertain damages suits against themselves in state courts. *See Will*, 491 U.S. at 65.

For decades, this clear-statement standard has been consistently used to protect numerous other default rules of our state-federal balance. "Absent clear statement by Congress," the Court will not read a statute "to place under federal superintendence a

vast array of conduct traditionally policed by the States." *Cleveland v. United States*, 531 U.S. 12, 27 (2000). Likewise, the Court has refused to interpret an ambiguous statute as granting powers to the federal government that "would result in a significant impingement of the States' traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). Similarly, the Court declined to read an ambiguous statute such that the traditional state power of regulating title would be altered and "[t]he title of every piece of realty purchased at foreclosure would be under a federally created cloud." *BFP*, 511 U.S. at 544. Finally, "[a]bsent a clear statement to the contrary," the Court would not read a federal statute as "preempt[ing] the traditional prerogative of the States to delegate their authority to their constituent parts." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 429 (2002).

But the clear-statement rule is not just used to protect against unintended encroachment on the federal-state balance; it also has been implemented to protect the balance *between* the federal branches. As the Court noted recently, "[s]eparation-of-powers concerns . caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Kucana v. Holder*, 558 U.S. 233, 237 (2010). For this reason, the Court has had a "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *I.N.S. v St. Cyr*, 533 U.S. 289, 298 (2001). Likewise, the Court will not interpret a statute to preempt the ordinary jurisdiction of courts to hear damage suits for executive-branch violations of constitutional rights when there is "no *ex-*

plicit congressional declaration" making such an abrogation. *Davis v. Passman*, 442 U.S. 228, 246–47 (1979) (emphasis in original) (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971)). *See also Carlson v. Green*, 446 U.S. 14, 19 (1980).

In sum, the Court has consistently held that long-standing and fundamental balances of power in our multi-branch, federal system can only be altered when a legislature has spoken clearly and unambiguously. As we shall see, the advice-and-consent rule for federal appointments represents just such a balance between the executive and legislative branches.

B. "Advice and Consent" Was Intended to Be—and Remains—the Default Balance of Power

The structure of the Appointments Clause shows the Framers' preference for advice and consent. Congress must affirmatively act—through a cumbersome process of bicameralism and presentment—in order to waive it in the appointment process of *each* inferior officer. Thus, "[t]he prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers." *Edmond*, 520 U.S. at 660. But this preference for advice and consent—and the importance of that mechanism for our balance of powers—is not only discernible from the text of the clause; it is also evident in the arguments made by the Framers at the time of its enactment, by the repeated statements of this Court, and by the continual practice of the federal government.

During the debates at the Constitutional Convention, supporters of an advice-and-consent require-

ment defended the importance of including both the executive and legislative branches in the decision-making process. Gouverneur Morris supported the proposal because "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security." 2 Farrand's Records: The Records of the Federal Convention of 1787, at 539 (Max Farrand ed., 1911).

In the Federalist Papers, Alexander Hamilton defended the Appointments Clause entirely on the basis of its superiority to proposals that would have vested appointments in one branch alone.[7] Addressing himself to those who "contend that the President ought solely to have been authorized to make the appointments under the federal government" Hamilton argued that the Senate "would be an excellent check upon a spirit of favoritism in the President." *The Federalist No. 76*, at 455–56 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton further warned of the dangers of unilateral appointments, since

> [i]t will readily be comprehended that a man who had himself the sole disposition of offices would be governed much more by his private inclinations and interests than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature.

Id. at 456.

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[7] Apart from where the Appointments Clause is quoted in full at the beginning of Federalist 76, the Excepting Clause goes entirely unmentioned in the Federalist Papers.

This defense of advice and consent—as a necessary component in a system of checks and balances—continued at the ratifying conventions. Advocating for the adoption of the proposed constitution in the Pennsylvania Convention, James Wilson assured his listeners that no one branch had been given too much power, pointing out that "the President must nominate before [the Senate] can vote. So that if the powers of either branch are perverted, it must be with the approbation of some one of the other branches of government: thus checked on one side, they can do no one act of themselves." 3 Farrand's Records: The Records of the Federal Convention of 1787, at 162 (Max Farrand ed., 1911). And at the North Carolina Ratifying Convention, James Iredell similarly defended the proposed system because the Senate would be "a restraint on improper appointments" by the president. 4 Elliot's Debates, at 134 (Jonathan Elliot ed., 1861).

The common thread in each of these defenses, from the Constitutional Convention through ratification, is the assumption that advice and consent would remain the default rule long after ratification. Adoption of the advice-and-consent requirement at the Convention represented the *defeat* of those who had wanted appointments vested in the unitary executive. It would have been incoherent for the same convention that rejected such a unitary model to have also passed the Excepting Clause unless the Framers assumed that its provisions would be used sparingly.

This Court has heeded the Framers' wisdom and repeatedly recognized that "[t]he principle of separation of powers is embedded in the Appointments Clause." *Freytag*, 501 U.S. at 882. As with so many of the mechanisms the Framers designed, "[the Ap-

pointments] Clause is a bulwark against one branch aggrandizing its power at the expense of another branch." *Ryder v. United States*, 515 U.S. 177, 182 (1995). As the Court has explained, any threat to the Appointments Clause is a threat to the accountability of the system as a whole. "Our separation of powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch" and the Appointments Clause "guards against this encroachment." *Freytag*, 501 U.S. at 878. Thus, "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government, but of the entire Republic." *Id.* at 880. In sum, "the Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659.

Given the obvious dangers which the Framers—and this Court—recognized in single-branch appointments, the Excepting Clause must have been intended as an exception that Congress would resort to only when it is *certain* that the needs of administrative efficiency outweigh the needs of political accountability. This is, in fact, how the system has developed. A search of the federal government's online database of employees reveals 1,217 positions that currently require presidential nomination and senate confirmation (PAS), compared to 362 positions appointed by the president alone (PA). *Compare* U.S. Government Policy and Supporting Positions (Plum Book) 2012, Appointment Type: Presidential Appointment with Senate Confirmation (PAS), http://bit.ly/2cX8BBY *with* Plum Book 2012, Appointment Type: Presidential Appointment (without Senate Confirmation) (PA), http://bit.ly/2d2AcTx

(both last visited Sept. 26, 2016). The fact that PAS positions still outnumber PA positions by a factor of more than 3-to-1 shows that waiving advice and consent has remained the exception to the rule.[8]

In brief, it is clear that the "intersection of the legislative and executive branches in appointments, with the responsibility of the President reinforced by the security of the Senate, constitutes a core inter-branch 'check and balance.'" Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 Harv. J. L. & Pub. Pol'y 103, 143 (2005). The Framers' expressed preference for the mechanism of advice and consent as a check on the executive branch, this Court's recognition of the importance of that check, and its sustained use as just such a check, are all every bit as longstanding and fundamental as the other separation-of-powers rules which this Court will not alter in the absence of a clear statement. Statutes purportedly overruling advice and consent must be held to exactly the same standard of explicitness and clarity.

C. The Attorney General—and the Only Court to Examine the Issue—Have Interpreted the Vacancies Act Strictly

As one lower court has recognized, "the Vacancies Act is generally strictly and narrowly interpreted." *Olympic*, 732 F. Supp. at 1198. Affirming the longstanding preference for advice and consent, both that court—the only one to squarely confront an am-

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[8] PA positions generally fall into one of two categories: largely apolitical and uncontroversial positions, such as the 12 members of the American Battle Monuments Commission, and positions whose primary role is to directly advise the president, such as the president's chief of staff and national security advisor.

biguous Vacancies Act provision (which this is not)—and the office of the attorney general have employed *de facto* clear-statement rules.

Where appointments statutes have been ambiguous, attorneys general have frequently rejected the readings that would waive advice and consent. In 1875, there was some ambiguity as to whether a law vested the appointment power of several newly created offices in the treasury secretary. Attorney General Edwards Pierrepont interpreted the law narrowly, stressing that such waivers must be explicit: "It is true that in regard to [similar, previously established officers], their appointment is in the Secretary of the Treasury. But this is by force of express legislative enactment, specially applicable to those officers." 15 U.S. Op. Atty. Gen. 3, 6 (1875). Thus, "there being no other statutory provision which imparts to [the secretary of the treasury] this authority," Pierrepont concluded "that under the Constitution their appointment can only be made by the President, with the advice and consent of the Senate." *Id.*[9]

A decade later, a statute stated that the "[Civil Service] Commission is authorized to *employ* a chief examiner." 18 U.S. Op. Atty Gen. 409, 410 (1886) (emphasis added). Although some interpreted this as suggesting an intent to vest the *appointment* power in the commission, Attorney General Augustus Hill

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[9] *See also* 15 U.S. Op. Atty. Gen. 449 (1878) (rejecting argument that Congress intended the appointment of the appraisers for the port of New York to remain with the treasury secretary, and instead reaffirming that "[w]here there is no express enactment to the contrary, the appointment of any officer of the United States belongs to the President, by and with the advice and consent of the Senate").

Harland held that only explicit language waiving advice and consent could have such effect, and that therefore "[t]he examiner is an officer to be appointed by the President by and with the advice and consent of the Senate." *Id.* at 411.

This same narrow approach has been applied specifically to the Vacancies Act as well. In 1890, the Act made "the assistant or deputy" of an officer the default acting officer in case of a vacancy. Solicitor General William Howard Taft interpreted the meaning of "assistant or deputy" at its narrowest, such that it "can only refer to assistants or deputies whose appointment is specifically provided for by statute." 19 U.S. Op. Atty. Gen. 503, 504 (1890). Thus, a naval officer who was the "assistant to the chief" of a naval bureau—but who did not receive this designation by statute—could not assume the role of chief during a vacancy. *Id. See also* 28 U.S. Op. Atty. Gen. 95 (1909) (naval officers designated as advisors to the secretary of the navy were not "officers" in the narrowest sense, so Vacancies Act provision authorizing the appointment of Naval Department "officers" to be acting secretary did not authorize such appointment).

And in a controversy perhaps the most similar to the present one, in 1909 the Chief of the Bureau of Steam Engineering was forced into retirement for health reasons, and President Roosevelt appointed an acting chief, believing he was authorized to do so under the Vacancies Act. But the Act authorized temporary appointments only "[i]n case of the death, resignation, absence, or sickness of the chief of any bureau," with "no provision . . made in any of these sections for temporarily filling a vacancy caused by the *retirement* of the chief of a bureau." 27 U.S. Op.

Atty. Gen. 337, 344, 345 (1909) (emphasis added). Since "'[r]esignation' of an office implies the consent of the incumbent to the giving up of the office and does not include the compulsory retirement of an officer by reason of disability to perform the duties of the office," *id.* at 345, Attorney General George W. Wickersham advised that "the Bureau remains without a head until the place is filled [by a permanent successor]," and that the acts of Roosevelt's temporary appointee were invalid. *Id.*

As the D.C. District Court accurately summarized, "the Attorney General and other senior government officials have, for the last 100 years, interpreted the Vacancies Act as giving the President authority to make interim appointments only when the express conditions of the Act are satisfied." *Olympic*, 732 F. Supp. at 1197. These opinions are relevant to this Court's FVRA interpretation because they show that "Congress has been on notice for more than 100 years that the Vacancies Act has generally been interpreted as giving the President authority to designate officers only when the statute's express terms are satisfied." *Id.* at 1196.

The *Olympic* court, which made that observation, is also the one lower court to squarely confront an ambiguous provision of the Vacancies Act. At the time, the language of the Vacancies Act authorized temporary appointments "[w]hen an officer of a bureau of an Executive department" leaves an office vacant. *Id.* at 1195. The court gave the word "officer" its narrowest meaning—that of a "Constitutional Officer" who took office in accordance with the Appointments Clause. *Id.* The officer whose resignation triggered the disputed appointment had *not* taken of-

fice in accordance with the Appointments Clause, so the court ruled the temporary appointment to be invalid. *Id.* at 1199. The clear-statement rule which the court applied recognized that "it is up to Congress . . . to decide the conditions under which the President may designate temporary replacements." *Id.* at 1196.

Finally, in addition to the persuasive arguments from both the executive and judicial branch, there is clear evidence that Congress *itself* intends waivers of advice and consent to be read narrowly. One of the purposes of the FVRA was to "expressly repudiate[] the contention that a law authorizing the head of a department to delegate or reassign duties among other officers is a statute that provides for the temporary filling of a specific office." 144 Cong. Rec. S6,414 (daily ed. June 16, 1998) (statement of Sen. Thompson). Instead of reading such statutes to allow for temporary appointments by implication, the FVRA requires that such effect be given only to statutes "expressly" authorizing the President to designate acting officials. *See* 5 U.S.C. § 3347(a)(1)(A). Thus, the FVRA effectively mandates a clear-statement approach to all other appointment statutes. Not to apply that approach when interpreting the FVRA *itself* would be in severe tension with the stated goal of its drafters: to limit waivers of advice and consent to situations where Congress unambiguously intended them.

III. THE FVRA DOES NOT CLEARLY AND EXPLICITLY WAIVE "ADVICE AND CONSENT" FOR APPOINTMENTS OF THE TYPE AT ISSUE HERE

The FVRA unambiguously authorizes the president to appoint several types of government officials

to be temporary acting officers in the event of a vacancy. 5 U.S.C. § 3345(a). These include the first assistant to the vacant office (which is the default appointment if the president does not act otherwise), *id.* § 3345(a)(1), a PAS officer from another department, *id.* § 3345(a)(2), or a high-ranking federal employee from the same department, *id.* § 3345 (a)(3).

But the FVRA also *limits* this authorization with the following language:

> Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if . [such person] served in the position of first assistant to the [vacant office] for less than 90 days [during the previous year]; and the President submits a nomination of such person to the Senate for appointment to such office.

Id. § 3345(b)(1).

In June 2010, President Obama appointed Lafe Solomon to be acting general counsel of the NLRB pursuant to Subsection (a)(3). *See* Pet. App. 5a. Neither party disputes that the text of the FVRA authorized this original appointment. In January 2011, however, the president then nominated Solomon to be the *permanent* general counsel of the NLRB. *See* Pet. App. 6a. At issue here is whether the FVRA authorized Solomon to remain as acting general counsel after he was so nominated. If Subsection (b)(1) serves as a limitation on *all* acting appointments (as indicated by the use of the broad language "a person may not serve as an acting officer for an office under this section"), then the FVRA did *not* authorize Solomon to remain as acting general counsel once he was nom-

inated for *permanent* general counsel. If, however, the preamble to Subsection (b)(1) ("Notwithstanding subsection (a)(1)") means that it serves as a limitation *only* on appointments made pursuant to Subsection (a)(1), then the statute did authorize Solomon to remain acting general counsel.

A clear-statement rule for interpreting statutory waivers of advice and consent gives a certain answer to this controversy. The FVRA did not explicitly and unambiguously limit the disqualification of Subsection (b)(1) to only acting officers appointed under Subsection (a)(1). As the D.C. Circuit explained, "'Notwithstanding' means 'in spite of,'—not, as the Board would have it, 'for purposes of' or 'with respect to.'" Pet. App. 13a (citing Oxford English Dictionary (2d ed. 1989); Black's Law Dictionary (10th ed. 2014)). Further, "the Board's interpretation of 'notwithstanding' is irreconcilable with the breadth of the words 'a person' and 'this section' in the remainder of the introductory clause." Pet. App. 14a. As the D.C. Circuit demonstrated, Congress could easily have drafted a clear and unambiguous statement that the disqualification of Subsection (b)(1) applies *only* to acting officers who took office pursuant to Subsection (a)(1), by instead writing (with changes to the actual statute in italics): "Notwithstanding subsection (a)(1), a *first assistant* may not serve as an acting officer for an office under *that subsection*, if . etc." *See* Pet. App 12a–13a. The actual language of the statute falls far short of such an explicit cabining of (b)(1).

Because the FVRA does not explicitly *limit* the disqualification of Subsection (b)(1) to only the acting officers of Subsection (a)(1), it does not explicitly *authorize* acting officers unilaterally appointed under

Subsections (a)(2) or (a)(3) to hold office while they violate the terms of Subsection (b)(1). Thus, the statute lacks a clear statement that Congress intended to waive advice and consent for acting officers in the situation of Lafe Solomon. Until Congress passes a new version of the FVRA with such explicit cabining language, this Court should not risk taking the advice and consent power away from the Senate in a situation where Congress never intended to waive it.

CONCLUSION

The Excepting Clause allows Congress to identify those particular situations where the needs of administrative efficiency and speedy appointment outweigh the accountability ensured by the advice-and-consent feature. Acting officers appointed under the terms of the FVRA—by the president alone and for a limited duration—are the type of appointments for which efficiency may temporarily outweigh accountability. That is precisely the type of situation which the Excepting Clause was written to provide for. And it is a situation which Congress—not the president—is given the prerogative of identifying.

Congress has done its job by enacting temporary-appointment statutes since as early as 1792. It has amended and updated the Vacancies Act several times—for example, by giving temporary appointments a length of tenure appropriate to the realities of the confirmation process of each era.[10] This shows

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[10] *See Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 210 (D.C. Cir. 1998) (describing how the tenure of valid temporary appointments was set at 10 days in 1868, then lengthened to 30 days in 1891, then to 120 days in 1988). The FVRA further extended this term to 210 days in

that Congress has taken its responsibility to weigh presidential accountability against administrative efficiency seriously, just as the Framers expected it would. But by requiring waivers of advice and consent to pass through the legislative process of bicameralism and presentment, the Framers built into our system a presumption for accountability as the more vital interest. Giving the benefit of the doubt to a unilateral appointment, such as the one made here, would turn this presumption on its head.

For the foregoing reasons, and those stated by the respondent, the decision below should be affirmed.

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1998. *See also* 144 Cong. Rec. S6,414 ("[T]he vicissitudes of the modern vetting process appear to require that the time be lengthened, to my regret.") (statement of Sen. Thompson); 144 Cong. Rec. S11,025 (daily ed. Sept. 28, 1998) ("By extending the time limitation on how long an acting official may serve, [the FVRA] is a bill that clearly recognizes the realities inherent in today's nominating process.") (statement of Sen. Byrd); 144 Cong. Rec. S12,767 ("[The FVRA] updates the Vacancies Act in several significant respects to more accurately reflect the realities of today's nominations process.") (statement of Sen. Levin).

RECORD
AND
BRIEF

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SW GENERAL, INC., DBA SOUTHWEST AMBULANCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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69 Fed. Reg. 11652 (Mar. 11, 2004) 9

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Other Authorities—continued: **Page(s)**

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78 Fed. Reg. 19434 (Apr. 1, 2013) 7

79 Fed. Reg. 52355 (Sept. 3, 2014) 9

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Bryan Garner, *Garner's Modern American Usage* (3d ed. 2009) 11

James L. Gattuso & Diane Katz, *Red Tape Rising: Obama Regs Top $100 Billion Annually* (May 2016), at https://goo.gl/ofrzqQ 6

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files *amicus curiae* briefs in cases raising issues of vital concern to the Nation's business community, including cases involving challenges to federal agency action, such as action by the National Labor Relations Board.

This case concerns the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345, *et seq.*, which limits when a nominee for a vacant office may also serve temporarily as the acting official for that same office. The question presented is whether § 3345(b)'s limitation applies to all temporary officials serving under 5 U.S.C. § 3345(a), or whether it applies only to the narrower class of officials who assume acting responsibilities under Subsection (a)(1) because they act as first assistants to the vacant office. Although this case specifically addresses when the Acting General Counsel of the National Labor Relations Board (the

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

"NLRB" or the "Board") may lawfully assume such responsibilities, the question is of far broader significance to the Chamber, whose members are subject to regulation and enforcement by the NLRB and many other federal agencies governed by the FVRA.

In a well-reasoned and thorough decision, the D.C. Circuit gave effect to the plain language of § 3345(b), limiting the circumstances in which the NLRB's Acting General Counsel may lawfully serve pursuant to § 3345(a)(2) or (a)(3), while also being the President's nominee for that office. As the largest representative of employers in the United States, the Chamber has a vital interest in ensuring that the NLRB at all times is acting within its authority when it discharges its duties, and that the Senate plays a meaningful role in providing advice and consent on the President's nominees for offices at the NLRB and myriad other agencies.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FVRA establishes rules for temporarily filling vacancies that require presidential appointment and Senate confirmation ("PAS" positions). It gives the President limited authority to appoint acting officers to serve temporarily in those positions, while restricting that temporary service to preserve the Senate's advice-and-consent role. Subsection (a)(1) sets the default rule for succession, providing that the first assistant "shall" become the acting officer. 5 U.S.C. § 3345(a)(1). The President may override that automatic succession rule by either directing an individual who already holds a different PAS position to serve as the acting officer, *id.* § 3345(a)(2), or direct-

ing a senior employee within the same agency to serve as the acting officer, *id.* § 3345(a)(3). Congress included § 3345(b)(1) to prevent the President from using acting service as a way to evade the Senate's advice-and-consent role. It provides that, "[n]otwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if" that person did not serve as first assistant to the vacant office for 90 days of the preceding year and has been nominated to that office. 5 U.S.C. § 3345(b)(1).

Subsection (b)(1)'s limitation is important given the vast power that acting officers wield. Such officials can occupy the highest reaches of government agencies. Despite their "acting" status, such officials can issue final rules with nationwide effect, approve statewide regulatory regimes, and make individual case determinations about the applicability of regulations that have profound effects on businesses and individuals.

The text of Subsection (b)(1) unambiguously applies to persons serving under Subsections (a)(2) and (a)(3), as well as (a)(1). Congress made three specific choices in the language of Subsection (b)(1) that make that meaning plain—beginning it with a "notwithstanding" clause, using the broad term "a person," and specifying that its limitation applied to "this section." Indeed, every federal judge to consider the issue has concluded that the plain text of § 3345(b)(1) unambiguously limits an individual's ability to serve temporarily as an acting officer pursuant to § 3345(a)(2) or (a)(3), and not just (a)(1). See Pet. App. 12a-20a; *Hooks* v. *Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 558-64 (9th Cir. 2016); *Hooks* v. *Remington Lodging & Hosp., LLC*, 8 F. Supp. 3d

1178, 1187-89 (D. Alaska 2014); *Hooks* v. *Kitsap Tenant Support Servs., Inc.*, No. C13-5470-BHS, 2013 WL 4094344, at *2 (W.D. Wash. Aug. 13, 2013). This Court should reach the same conclusion.

ARGUMENT

I. The FVRA Ensures The President Does Not Bypass The Senate's Advice And Consent Role In Nominations

One of the FVRA's core purposes is preventing the President from installing an officer of the United States to a PAS position without the Senate's constitutional check of advice and consent. Resp. Br. 11-14. The FVRA's reforms are a critical safeguard for the separation of powers and guard against executive aggrandizement in the myriad areas in which executive officers are vested with authority to take actions with the force of law. The range of officials subject to the FVRA is as broad as the Executive Branch itself. Absent faithful application of the FVRA's limitations on acting service, the President could install his chosen officials without Senate approval; those officials could then take a wide range of actions carrying the force of law, subjecting businesses and individuals nationwide to regulations, enforcement actions, and other agency determinations with serious real-world consequences. Acting officials who are permanent nominees are more likely than temporary caretakers to be emboldened to take significant actions to advance the President's agenda.

It is difficult to overstate the broad universe of offices subject to the FVRA, or the scope of practical and legal consequences that would result from the government's proposed interpretation of that statute.

By its terms, the FVRA applies to any "officer of an Executive agency," defined to include those in "the Executive Office of the President," whose appointment "is required to be made by the President, by and with the advice and consent of the Senate." 5 U.S.C. § 3345(a). The FVRA thus applies to all of the officials who lead agencies responsible for regulating virtually every sector of the U.S. economy, from the Environmental Protection Agency ("EPA") and Department of Health and Human Services to the Departments of Homeland Security, Commerce, and State, as well as the Office of Management and Budget. By statute, those serving in covered offices exercise a vast range of authority. In addition, most federal agency heads and other principals have standing delegations of authority to subordinates via "internal delegations and appointments of authority." Approval and Promulgation of Air Quality Implementation Plans, 80 Fed. Reg. 26189, 26189-26190 (May 7, 2015); see *U.S. Telecom Ass'n* v. *F.C.C.*, 359 F.3d 554, 565 (D.C. Cir. 2004) (finding such subdelegation "presumptively permissible"); see *Touby* v. *United States*, 500 U.S. 160, 169 (1991) (upholding Attorney General's power to subdelegate).[2]

As a result, acting officials covered by the FVRA and operating at many different levels of an agency's internal organization often wield significant authority, making the Senate's advice-and-consent role cru-

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[2] Many agencies do not make their subdelegations readily available to the public. For instance, the EPA Delegations Manual, which outlines EPA's general methods of delegating powers and functions within the agency, is not readily available to the public, yet EPA frequently invokes it to defend subordinate officials' actions. *E.g.*, 80 Fed. Reg. at 26190.

cial. Even a few examples illustrate the importance of ensuring the President is not able to bypass the Senate by readily resorting to the use of acting officials.

1. To begin with the example presented in this case, the NLRB's General Counsel has substantial enforcement powers under the National Labor Relations Act. The General Counsel exercises "general supervision" over NLRB attorneys and "the regional offices," as well as "final authority * * * in respect of the investigation of charges and issuance of [unfair labor practice] complaints." 29 U.S.C. § 153(d). The General Counsel brings enforcement proceedings against those who do not comply with Board-issued subpoenas. See 29 C.F.R. § 102.31(d). Simply responding to such an investigation—to say nothing of defending against charges if a complaint is issued—can impose substantial costs on employers, sometimes resulting in tens if not hundreds of thousands of dollars in legal fees.[3]

Other acting officials can exercise similarly broad powers. To take another example from among the positions the government acknowledges were filled based on its flawed and aggressive reading of the FVRA, see Pet. Br. App. 74a, the Deputy Administrator of the EPA can wield essentially the entire authority of the Administrator, which includes some of the most far-reaching, burdensome, and controversial regulatory schemes in the U.S. Code. *E.g.*, 42 U.S.C.

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[3] See, *e.g.*, 145 Cong. Rec. 6764 (1999) (reporting that a single employer "had to spend more than $600,000 in legal fees from one salting campaign, with the average cost per charge of more than $8,500").

§ 7601(a) (rulemaking authority under Clean Air Act); *id.* § 6912(a)(1) (same, Resource Conservation and Recovery Act); 33 U.S.C. § 1361(a) (Clean Water Act); see generally James L. Gattuso & Diane Katz, *Red Tape Rising: Obama Regs Top $100 Billion Annually* (May 2016), at https://goo.gl/ofrzqQ (EPA regulations promulgated in 2015 alone increased regulatory costs by $11.1 billion, according to EPA's own calculations). By regulation, the Deputy Administrator has blanket authority to "assist[] the Administrator in the discharge of Agency duties and responsibilities," and can even "serve[] as Acting Administrator." 40 C.F.R. § 1.23. Under that authority, Acting Deputy Administrators have taken a lead role in notice-and-comment rulemaking, including in notoriously controversial areas such as the scope of federal jurisdiction under the Clean Water Act.[4] And by regulation, the Deputy Administrator has authority over all appeals by small business owners regarding whether they have complied with EPA standards. See 40 C.F.R. § 21.5. That kind of substantive rulemaking authority and important decisionmaking power underscores the need for Senate advice and consent. Statutes, regulations, and internal agency memoranda charge scores of other officials at the NLRB, EPA, and other agencies with comparable powers.

2. One need look no further than the Federal Register to see that acting officials routinely take actions that carry the force of law and have real-world consequences for businesses and individuals. For starters, acting officials often issue or approve substantive

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[4] See, *e.g.*, Proposed Rule for the Clean Water Act Regulatory Programs of the Army Corps of Engineers and the Environmental Protection Agency, 57 Fed. Reg. 26894 (June 16, 1992).

regulations. They routinely propose[5] and issue final rules with nationwide effect,[6] and respond to comments made in the rulemaking process.[7] They also issue authoritative guidelines for implementing federal programs,[8] and approve state regulatory regimes that are subject to federal standards.[9]

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[5] Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category, 78 Fed. Reg. 19434 (Apr. 1, 2013) (issued by Acting Administrator of EPA).

[6] See, *e.g.*, Securement of Unattended Equipment, Docket No. FRA-2014-0032, Notice No. 2 (July 27, 2015) (Acting Administrator of Federal Railroad Administration issues final rule on unattended railroad equipment); Requirements and Procedures for Consumer Assistance To Recycle and Save Program, 74 Fed. Reg. 38974 (Aug. 5, 2009) (Acting Deputy Administrator of NHTSA issues final rule governing federal automobile exchange and disposal program); Rules of Practice for Motor Carrier Proceedings; Violations of Commercial Regulations, 65 Fed. Reg. 7753 (Feb. 16, 2000) (Acting Deputy Administrator of FMCSA issues final rule governing various aspects of proceedings under the ICC Termination Act of 1995); Motor Vehicle Content Labeling, 64 Fed. Reg. 40777 (July 28, 1999) (Acting Deputy Administrator of NHTSA adopts final rule concerning labeling required for passenger vehicles); Consolidation, Elimination, and Clarification of Various Regulations, 62 Fed. Reg. 13938 (Mar. 24, 1997) (Acting Deputy Administrator of DEA issues final rule making numerous changes to federal regulations covering "the pharmaceutical, chemical, and health care industries").

[7] Elimination of Route Designation Requirement for Motor Carriers Transporting Passengers Over Regular Routes, 74 Fed. Reg. 36614 (July 24, 2009).

[8] See, *e.g.*, Guidelines for Implementing the Hardship Grants Program for Rural Communities, 62 Fed. Reg. 13522 (Mar. 20, 1997) (Acting Assistant Administrator of EPA issues guidelines governing "a $50 million grant program").

[9] See, *e.g.*, Approval and Promulgation of Air Quality Implementation Plans, 80 Fed. Reg. at 26189-26190 (Acting EPA Re-

Acting officials also make individual adjudicatory determinations of profound importance for businesses and individuals. For instance, they routinely decide whether to grant regulatory waiver requests,[10] or applications for regulatory exemptions.[11] They also approve or deny applications for certifications that are necessary for certain businesses.[12] These decisions are highly significant to the individuals and entities affected by them.

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gional Administrator approves New Mexico's State Implementation Plan, pursuant to Federal Clean Air Act).

[10] See, *e.g.*, Notice of Regulatory Waiver Requests Granted for the Second Quarter of Calendar Year 2014, 79 Fed. Reg. 52355, 523356-52358 (Sept. 3, 2014) (reporting three decisions to waive regulations, made by various "[a]cting" officials of the Office of Community Planning and Development)

[11] See, *e.g.*, Parts and Accessories Necessary for Safe Operation; General Motors Corporation's Exemption Application; Minimum Fuel Tank Fill Rate and Certification Labeling, 65 Fed. Reg. 24531 (Apr. 26, 2000) (Acting Deputy Administrator of FMCSA grants GM's application for exemption from certain fuel tank design and certification labeling requirements); Controlled Substances and Alcohol Use and Testing; PacifiCorp Electric Operations' Exemption Application; Random Testing of Drivers, 65 Fed. Reg. 24533 (Apr. 26, 2000) (Acting Deputy Administrator of FMCSA denies company's application for exemption from requirement of random substance and alcohol tests); Commercial Driver's License: Commonwealth of Virginia, Department of Motor Vehicles; Application for Exemption, 74 Fed. Reg. 10120 (Mar. 9, 2009) (Acting Deputy Administrator of FMCSA grants Virginia's application for an exemption allowing it to accept black and white photographs on commercial driver's licenses).

[12] See, e.g., Denial of Application, 69 Fed. Reg. 22559 (Apr. 26, 2004) (Acting Deputy Administrator of DEA denies certification for small business owner planning to distribute various cough medicines to gas stations); Denial of Application, 69 Fed. Reg. 11652 (Mar. 11, 2004) (same, denial of certification for applicant planning to distribute to gas stations and convenience stores).

There is thus every reason to believe that Congress intended to protect the Senate's primary role in providing advice and consent as to the officers who wield such wide-ranging powers.

II. By Its Plain Terms, § 3345(b)(1) Limits An Individual's Ability To Serve Temporarily As An Acting Official Under § 3345(a)(2) Or (a)(3)

The plain language of the statute confirms this understanding. Section 3345(b)(1) states that "[n]otwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if" that person did not serve as first assistant to the vacant office for 90 days of the preceding year and has been nominated to that office. 5 U.S.C. § 3345(b)(1). Three features of that language—the use of "[n]otwithstanding," "a person," and "this section"—make clear that Subsection (b)(1) applies to individuals acting as temporary officers under Subsections (a)(2) and (a)(3), as well as those serving under Subsection (a)(1).

A. The Government's Interpretation Turns The Term "Notwithstanding" On Its Head

1. The Plain Meaning Of "Notwithstanding" Requires An Expansive Application Of Subsection (b)(1)

The government's textual argument focuses primarily—almost exclusively—on the opening dependent clause of Subsection (b)(1). See Pet. Br. 26-37. But the government's argument skips over what the word "notwithstanding" actually means. The plain meaning of "notwithstanding" prevents Subsection (a)(1) from limiting Subsection (b)(1) , as the government contends.

When interpreting a statute, this Court "look[s] first to its language, giving the words used their ordinary meaning." *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (quoting *Moskal* v. *United States*, 498 U.S. 103, 108 (1990)). The ordinary meaning of "notwithstanding" is "in spite of" or "despite." *Black's Law Dictionary* 1230 (10th ed. 2014); accord Bryan Garner, *Garner's Modern American Usage* 575 (3d ed. 2009) ("despite," "in spite of," or "although"); *The American Heritage Dictionary of the English Language* 1238 (3d ed. 1992) ("In spite of:" "All the same; nevertheless:" "In spite of the fact that; although"). By that ordinary meaning, the opening clause provides that the restrictions in Subsection (b)(1) should apply *in spite of* what Subsection (a)(1) says. In other words, Subsection (a)(1) does not limit the application of Subsection (b)(1).

In the statutory context, "*[n]otwithstanding* performs a function opposite that of *subject to*. A dependent phrase that begins with *notwithstanding* indicates that the main clause that it introduces or follows derogates from the provision to which it refers." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 126 (2012). Thus, when an opening clause uses the term "notwithstanding" in reference to a prior provision, it is ensuring that the main clause it introduces is not limited by that prior provision. *Ibid.* (noting the "superordinating" function of the term "notwithstanding").

The government's interpretation of Subsection (b)(1) turns the term "[n]otwithstanding" on its head by reading it to *restrict* the meaning of Subsection (b)(1). Indeed, the government reads "[n]otwithstanding subsection (a)(1)" to mean that

Subsection (b)(1) applies "*only* to persons who automatically assume acting status based on the general rule in Subsection (a)(1)." Pet. Br. 14 (emphasis added). In effect, it gives "notwithstanding" the *opposite* of its ordinary meaning. Tellingly, the government cannot point to a single definition of "notwithstanding," or any instance of everyday usage, that supports its backwards interpretation of "notwithstanding" as a term of limitation. See Pet. Br. 20-55. Nor has it identified any decisions from this Court—or any other—adopting that idiosyncratic approach.

In fact, this Court's precedent is to the contrary. *Shomberg* v. *United States*, 348 U.S. 540 (1955), rejected a similarly misguided construction of an opening "notwithstanding" clause. *Shomberg* involved the Immigration and Nationality Act of 1952 and addressed the interaction of a savings clause that preserved the validity of existing immigration documents (Section 405(a)), a non-retroactivity provision specifying that a petition for naturalization would be determined under the law in effect at the time of its filing (Section 405(b)), and a provision saying that "[n]otwithstanding the provisions of section 405(b)," "no petition for naturalization shall be finally heard" if a deportation proceeding was then pending (Section 318). The petitioner argued that Section 318 had no application to the savings clause in Section 405(a) because Section 318 mentioned only Section 405*(b)*. *Id.* at 543. While acknowledging that the "notwithstanding clause" "at first glance might indicate that it was intended not to apply to § 405(a)," the Court deemed that position "untenable," concluding that Congress's "intent is plain enough" that Section 318 "super-

sede[d] rights" under both Sections 405(a) and (b). *Id.* at 545.

This Court should reach the same conclusion here and reject the government's attempt to subvert the plain meaning of Subsection (b)(1)'s "notwithstanding" clause.

2. The Statutory Context Confirms The Plain Meaning Of "Notwithstanding" In Subsection (b)(1)

An examination of the statutory context underscores this reading. First, giving "notwithstanding" its plain meaning in Subsection (b)(1) would be consistent with the principle that, when used "in contraposition," the term "may" is permissive and the term "shall" is mandatory. *Jama* v. *Immigration & Customs Enf't*, 543 U.S. 335, 346 (2005); see *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1977 (2016) ("When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty."). Subsection (a)(1) uses "shall" to establish a default rule whereby the first assistant temporarily assumes the responsibilities of the officer. 5 U.S.C. § 3345(a)(1). Then Subsections (a)(2), (a)(3), and (c)(1) establish circumstances where the President "*may* direct" someone other than the first assistant to be the acting officer: a PAS official, *id.* § 3345(a)(2) (emphasis added), or an employee who has attained at least a GS-15 pay grade and 90 days' service in the agency, *id.* § 3345(a)(3). Subsection (b)(1) then specifies when individuals "may not serve" under § 3345. *Id.* § 3345(b)(1). As the Ninth Circuit recognized, it is logical that each subsection using the permissive verb "may" would open with the

phrase "[n]otwithstanding subsection (a)(1)"[13] to make clear that the mandatory "shall" in Subsection (a)(1) does not override it. See *Hooks*, 816 F.3d at 560. Thus, interpreting the "notwithstanding" clauses to mean "in spite of" conforms to the use of "may" and "shall" in the statute.

This understanding of the contrast between permissive and mandatory language makes clear why the government is wrong to suggest that the D.C. Circuit's reading "renders that specific language superfluous." Pet. Br. 37. As the Ninth and D.C. Circuits agreed, the plain meaning of "notwithstanding" gives effect to the "notwithstanding" clause in Subsection (b)(1)—along with the similar clauses in Subsections (a)(2), (a)(3), and (c)(1)—because they all clarify the "order of operations" between those subsections and subsection (a)(1). See Pet. App. 14a; *Hooks*, 816 F.3d at 560 ("The 'notwithstanding' language, as used in (a)(2), (a)(3), and (b)(1), simply provides that, although that default rule exists, these other provisions still apply.").

Second, giving "notwithstanding" its plain meaning in Subsection (b)(1) follows the "principle * * * that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). As explained above, the D.C. Circuit's reading ensures that the mandatory "shall" in Subsection (a)(1) does not override the permissive "may" in the other subsections (or the equally manda-

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[13] Of course, Subsections (a)(2) and (a)(3) refer to "paragraph (1)" instead of "subsection (a)(1)," because they are also under the heading of Subsection (a). See 5 U.S.C. § 3345(a)(2), (3). But the meaning is the same.

tory "may not" in subsection (b)(1)). See Pet. App. 14a-15a. The government's proposed interpretation, by contrast, gives the "notwithstanding" clause in (b)(1) a very different meaning than the term has throughout Subsection (a). The government *claims* that it reads all the "notwithstanding" clauses "consistently with each other, as carving out an exception to the default rule that the first assistant shall perform the duties of the vacant office." Pet. Br. 22. But under the government's reading, Subsection (b)(1) is the only provision that applies *only* to Subsection (a)(1): It never claims that the "[n]otwithstanding" clauses of Subsections (a)(2) and (a)(3) limit their application in the same way.

For good reason. Under that approach, the President's discretionary power under Subsections (a)(2) and (a)(3) could be used *only* to replace the first assistant serving automatically under Subsection (a)(1). And that would mean that the President could not (for example) exercise his discretion under Subsection (a)(2) to replace a temporary officeholder whom the President previously directed to act under Subsection (a)(3)—despite Subsection (a)(2)'s clear authorization that he "*may* direct" a PAS official to act in the vacant office. Such a position cannot be squared with the plain language of those subsections.

The government's reliance on the negative-implication canon, and the fact that Subsection (b)(1) references "Subsection (a)(1)" alone, is misplaced. See Pet. Br. 28-30. That argument overlooks the fact that, given their substantive differences, Subsection (b)(1) does not need a broader "notwithstanding" clause to limit Subsections (a)(2) and (a)(3). *Cf. Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*,

541 U.S. 246, 257-58 (2004) (noting that a "notwithstanding" clause "might have been nice, but hardly seems necessary" given how the substance of the two statutory provisions determined their interaction). The provisions simply work differently. Because Subsection (b)(1) plainly specifies the circumstances under which a person "may not serve" as an acting officer, there was no need for it to reference the permissive provisions of Subsections (a)(2) and (a)(3). Congress often uses the phrase "may not serve" in this way to effectively limit—without using any "notwithstanding" clause—the President's ability to place individuals in office. See, *e.g.* 42 U.S.C. § 1395kkk(g)(2)(A) (providing that, though the President has the power to appoint members of the Independent Payment Advisory Board, "a member *may not serve* more than 2 full consecutive terms" (emphasis added)); 54 U.S.C. § 304101(c) (providing that, though President has the power to appoint members to the Advisory Council on Historic Preservation, "[a]n appointed member *may not serve* more than 2 terms" (emphasis added)).

A broader "notwithstanding" clause is also unnecessary because Subsection (b)(1) explicitly applies to "this section." As the D.C. Circuit recognized, Subsection (b)(1)'s use of "the phrase 'this section' plainly refers to section 3345 in its entirety," thereby making a person's ability to serve under § 3345(a)(2) and (a)(3) subject to the conditions in Subsection (b)(1). Pet. App. 12a. Broadening the "notwithstanding" clause would simply have created redundancy in the statute.

Moreover, the D.C. Circuit's reading aligns with the "usual rule" that "when the legislature uses cer-

tain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (internal quotation marks omitted). Here, the use of introductory "notwithstanding" clauses in Subsections (a)(2), (a)(3), (b)(1), and (c)(1) contrasts sharply with the use of the introductory "For purposes of" clause in Subsection (c)(2). See 5 U.S.C. § 3345(c)(2) ("For purposes of this section * * * the expiration of a term of office is an inability to perform* * *"). Following the plain meaning of "notwithstanding" ensures that those different clauses receive different meanings.

3. The Government's Alternative Wording Arguments Fail

The government also makes a number of counterfactual arguments based on language Congress did *not* enact in Subsection (b)(1)'s "notwithstanding" clause. It asserts that, if Congress had intended for Subsection (b)(1) to apply to all of Subsection (a), it would have said "notwithstanding any other provision of law," Pet. Br. 31, or "[n]otwithstanding subsection (a),' or '[n]otwithstanding subsections (a)(1), (a)(2), and (a)(3)," Pet. Br. 33. Those arguments do not withstand scrutiny.

While the government asserts that Subsections (a)(2) and (a)(3) "are just as categorical as Subsection (a)(1)," Pet. Br. 32-33, those provisions do not use the mandatory term "shall." There is thus no need for a "notwithstanding" clause to prevent them from affecting Subsection (b)(1). And given the narrow sweep of Subsection (b)(1), it is perfectly sensible that Congress did not use the phrase "[n]otwithstanding any other provision of law." Pet. Br. 31. Subsection (b)(1)

specifies that it applies to "a person * * * serv[ing] as an acting officer * * * *under this section*." 5 U.S.C. § 3345(b)(1) (emphasis added). Because Subsection (b)(1) is limited in scope to a single section, it would have been nonsensical to include a wide-ranging "notwithstanding" clause that swept in every section of all fifty-two titles of the United States Code. Indeed, the government acknowledges that, when it comes to "notwithstanding" clauses, more "precise provisions" are preferable. Pet. Br. 31. The government's argument also fails to account for 5 U.S.C. § 3347(a), which establishes that certain statutory provisions provide alternatives to the FVRA. Using an omnibus "notwithstanding" clause would unnecessarily conflict with that provision.

The government's arguments are also undercut by lengthy congressional practice. There are numerous Code provisions in which a subsection or paragraph with a mandatory "shall" is followed by a provision containing "notwithstanding" language to ensure that the mandatory provision does not override permissive language in a neighboring provision. See, *e.g.*, 7 U.S.C. § 6d (paragraph (2) provides that funds of a swaps customer and the futures commission merchant "shall not" be commingled, while subparagraphs (3)(a) and (b) provide that funds "may" be commingled in certain conditions, "[n]otwithstanding paragraph (2)"); 15 U.S.C. § 80a-56 (subsection (d) provides that "it shall be unlawful" for noncontrolling shareholders or affiliates to conduct certain transactions, while subsections (f), (g), and (j) permit certain transactions "[n]otwithstanding subsection (d)").[14]

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[14] See also, *e.g.*, 10 U.S.C. § 125(a), (b), (c) (similar); 15 U.S.C. § 80a-17(a), (b), (c) (similar).

The government tellingly cannot offer a *single instance* of another statute containing an introductory "notwithstanding" clause that has the same effect it claims is present here—restricting the meaning of the clause it introduces.

B. The Plain Meaning Of "A Person" In Subsection (b)(1) Makes Clear That It Applies To Individuals Other Than First Assistants Serving Under Subsection (a)(1)

By its plain terms, Subsection (b)(1) applies to acting officers serving under (a)(2) and (a)(3) because it provides that "*a person* may not serve as an acting officer for an office under this section." 5 U.S.C. § 3345(b)(1) (emphasis added). The broad scope of the word "person" plainly covers more than "the first assistant" referenced in Subsection (a)(1).

To begin, the phrase "a person" is expansive. As this Court has noted frequently, the term "person" has "a broa[d] meaning in the law." *Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012); accord *Pfizer* v. *Gov't of India*, 434 U.S. 308, 312 (1978) ("the phrase 'any person'" has a "naturally broad and inclusive meaning"). And the "indefinite or generalizing force of 'a'" confirms the breadth intended for the term "person." *Am. Bus Ass'n* v. *Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000); *In re Cardelucci*, 285 F.3d 1231, 1234 (9th Cir. 2002) (same). Thus, Congress intentionally made the object of Subsection (b)(1) broad.

In contrast, the term "the first assistant" is very narrow. A "first assistant" is not just any "person," but someone who holds a particular position that does not always (or even usually) exist for many statutory offices. Moreover, the use of "the definite article" un-

derscores that there is "only one" first assistant for purposes of Subsection (a)(1). See *Rumsfeld* v. *Padilla*, 542 U.S. 426, 434 (2004); *Rapanos* v. *United States*, 547 U.S. 715, 732 (2006) (plurality opinion) ("[t]he use of the definite article" indicates a "narrow[er]" reference).

For at least two reasons, the broader statutory context confirms that Congress used the term "person" in Subsection (b)(1) to reach beyond Subsection (a)(1) to individuals acting under (a)(2) and (a)(3).

First, giving "person" its naturally expansive meaning is faithful to the bedrock rule of construction that the same word should generally have the same meaning within a particular statute, and different terms should have different meanings. See *Powerex Corp.*, 551 U.S. at 232; see also *Sosa*, 542 U.S. at 712 n.9 (presuming "different language" in different parts of a statute indicates "different meanings"). Doing so ensures that the term "person" is given the same meaning in Subsections (a)(2) and (b)(1). See 5 U.S.C. § 3345(a)(2), (b)(1). And it gives meaning to the very different terms used in Subsections (a)(1) and (b)(1)—"the first assistant" and "a person."

Second, Congress consciously used different levels of specificity in defining the objects of Section 3345's various subsections, confirming that "a person" in (b)(1) has broad effect. Subsection (a)(1) uses the phrase "the first assistant" because it identifies the particular individual who should be elevated automatically to acting status when a vacancy arises. See 5 U.S.C. § 3345(a)(1). Subsection (a)(2) uses the broader term "person" to ensure that all eligible PAS officials are covered. *Id.* § 3345(a)(2). Subsection (a)(3) uses "officer or employee" because it is limited

to those individuals who have held positions within the agency. *Id.* § 3345(a)(3). And Subsection (c)(1) uses "officer" because it is limited to those individuals who have already occupied the office in question and are being reappointed. *Id.* § 3345(c)(1). Given the precision with which Congress defined the objects of all the surrounding subsections, it is only logical to conclude that Congress intended the breadth of scope that follows from using the broad term "person" in Subsection (b)(1).

C. The Plain Meaning Of "This Section" Establishes That Subsection (b)(1) Applies To Subsections (a)(2) And (a)(3)

When Subsection (b)(1) states that "a person may not serve as an acting officer for an office under *this section*," 5 U.S.C. § 3345(b)(1) (emphasis added), the term "this section" can have only one possible meaning: all of Section 3345.

The term "section" has a specific meaning in the "hierarchical scheme" that Congress uses in drafting federal statutes. See *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 60 (2004). A "section" is comprised of subsidiary "subsections," "paragraphs," "subparagraphs," and "clauses." See *id.* at 60-61 (quoting the House's and Senate's drafting manuals). So "section" is the "naming convention[]" for the "most fundamental division" of the statute. See M. Douglass Bellis, *Statutory Structure and Legislative Drafting Conventions: A Primer for Judges* 7-8 (2008). Here, the term refers to the entire "division" falling under the "designation" of Section 3345. *Id.* at 8.

The FVRA's numerous and reticulated cross-references confirm that Congress used "this section"

in its ordinary sense. As the Ninth and D.C. Circuits both noted, Congress was precise in inserting internal cross-references into the FVRA. See *Hooks*, 816 F.3d at 559 (collecting the FVRA's uses of "section," "subsection," and "paragraph"); Pet. App. 12a. Crucially, all of those cross-references follow the established "naming conventions" for "basic subdivisions of federal laws" described above. Bellis, *supra*, at 7. This consistent and precise usage forecloses the government's assertion that "this section" means "Subsection (a)(1)." Pet. Br. 33.

The government's interpretation would again violate the rule that the same words, used in the same statute, carry the same meaning. See *Powerex Corp.*, 551 U.S. at 232. Indeed, every time the FVRA uses the phrase "this section" or the term "section," it refers to the section *in its entirety*, not to a particular subsection or paragraph within that section. For instance, Subsection (c)(2) uses "this section" to reference all of Section 3345 when it defines "the expiration of a term of office" "[f]or purposes of *this section* and *sections* 3346, 3347, 3348, 3349, 3349a, and 3349d." 5 U.S.C. § 3345(c)(2) (emphasis added). So too for the 14 other occurrences of "section," see *id.* § 3345(a)(1); *id.* § 3345(a)(2); *id.* § 3345(a)(3); *id.* § 3347(a); *id.* § 3348(b); *id.* § 3348(c); *id.* § 3348(d)(1); *id.* § 3349(a)(1); *id.* § 3349(b); *id.* § 3349a(a); *id.* § 3349b; *id.* § 3349c; *id.* § 3349d(a); § 3349d(b). Congress plainly did not intend for "section" in Subdivision (b)(1) to have a meaning that is out of step with the fifteen other provisions that use that same term.

CONCLUSION

For these reasons, and those in respondent's brief, the judgment below should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in preserving the balanced system of government laid out in our nation's charter, as well as the proper interpretation of laws that are relevant to that balance. Accordingly CAC has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In June 2010, pursuant to his authority under the Federal Vacancies Reform Act, 5 U.S.C. § 3345(a)(3), President Obama named senior National Labor Relations Board (NLRB) official Lafe Solomon to serve as the Board's Acting General Counsel. In January 2011, President Obama nominated Solomon to be the NLRB's permanent General Counsel. Respondent SW General contends, and the court below held, that Solomon could not legally perform the duties of General Counsel after he was nominated to fill that position on a permanent basis. According to the court be-

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

low, the Federal Vacancies Reform Act (FVRA) prohibits any person from being both an acting officer and the permanent nominee unless he previously served as first assistant to that office. *Amicus* submits this brief to demonstrate the importance that the Framers attached to the President's ability to staff the executive branch, and to explain why the decision of the court below, which would significantly undermine the President's ability to temporarily fill an executive branch vacancy with the individual the President believes best able to fill the office permanently, is at odds with the law's text and history.

When the Framers drafted our enduring Constitution, their design sharply departed from the precursor Articles of Confederation in its creation of a strong Executive Branch headed by a single President. Under the Constitution, this new President would have sole responsibility for executing the nation's laws, but he would be aided in that constitutional obligation by subordinate officers of his choosing. As the Framers recognized, "[t]he ingredients which constitute energy in the Executive are . . . an adequate provision for its support." *The Federalist No. 70* (Alexander Hamilton); *The Federalist No. 72* (Alexander Hamilton) (recognizing that there would be "assistants or deputies of the chief magistrate" who "ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence"). Indeed, as this Court has recognized, "the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates." *Myers v. United States*, 272 U.S. 52, 117 (1926). To ensure that the President has the executive support he needs, Congress has long provided that the President can temporarily fill offices until the Senate is able to

provide its advice and consent to a permanent nominee.

The FVRA is the federal law that currently governs the designation of acting officers to temporarily fill vacancies that can only be permanently filled following Senate confirmation. It provides a default rule that "[i]f an officer of an Executive agency dies, resigns, or is otherwise unable to perform the functions and duties of the office . . . the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(1). In addition to that default rule, it also gives the "President (and only the President)" the power to designate others to fill the position in lieu of the first assistant: (1) a person who already serves in a Senate-confirmed position, *id.* § 3345(a)(2); (2) a person who has served in a senior position (i.e., one with a rate of pay equal to the minimum for GS-15 or higher) in the agency for at least 90 days in the year preceding the vacancy, *id.* § 3345(a)(3), or (3) a person who has been nominated "for reappointment for an additional term to the same office" until the Senate confirms or rejects the nomination, *id.* § 3345(c)(1).

Subsection (b)(1) of the law—the provision at issue in this case—provides that "[n]otwithstanding subsection (a)(1) [the provision providing the default rule that the first assistant fills the vacancy], a person may not serve as an acting officer for an office under this section" if the President nominates him to fill the vacant office permanently and he "served in the position of first assistant . . . for less than 90 days" during the year preceding the vacancy. *Id.* § 3345(b)(1). In other words, the President cannot nominate someone and, at the same time, make him the first assistant, so that he automatically fills the

vacancy while his nomination is pending. By including this restriction, Congress ensured that a nominee can fill the position temporarily only if he had been previously serving in government—either because, pursuant to subsection (b)(1), he served as a first assistant for not less than 90 days during the year preceding the vacancy or because, pursuant to other provisions of the law, he was already serving in a Senate-confirmed position or was already serving in the agency in a senior position.

The decision of the court below significantly expands the limitation in subsection (b)(1), reading it to apply not just to the provision of the law actually identified in its text ("[n]otwithstanding subsection (a)(1)," 5 U.S.C. § 3345(b)(1)), but to other provisions of the law as well. This decision is at odds not only with the text of the law, but with Congress's legislative plan in enacting it. *See King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) ("[I]n every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan.").

As the law's legislative history makes clear, the FVRA was a direct response to perceived violations of the Appointments Clause by the executive branch. *See, e.g.*, S. Rep. No. 105-250, at 5 (1998) ("the Senate's confirmation power is being undermined as never before"). Among other things, Senators wanted to prevent the President from circumventing the Senate's advice-and-consent process by nominating someone from outside the government to fill a vacancy and, at the same time, making him first assistant so that he could immediately begin performing the duties of the vacant office in an acting capacity. By imposing a length of service requirement on first as-

sistants who were also the nominee, Congress sought "to prevent manipulation of first assistants to include persons highly unlikely to be career officials." *Id.* at 13. Significantly, the provisions that allow the President to designate someone other than the first assistant to temporarily fill an office contain their own internal limitations that avoid the circumvention concern—either the person has already been confirmed by the Senate to a position in the executive branch, 5 U.S.C. § 3345(a)(2), (c)(1), or is subject to a length-of-service requirement, *id.* § 3345(a)(3). Significantly, Senator Fred Thompson, one of the key sponsors of the FVRA, made clear that subsection (b)(1) did *not* apply to subsections (a)(2) or (a)(3): "Under § 3345(b)(1), the revised reference to § 3345(a)(1) means that this subsection applies only when the acting officer is the first assistant, *and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3).*" 144 Cong. Rec. S12822 (Oct. 21, 1998) (emphasis added).

By concluding otherwise, the court below reached a decision that is not only at odds with the text and history of the FVRA, but one that would, if upheld, significantly limit the President's ability to temporarily staff important executive branch offices with the individuals that he or she believes best equipped to fill them on a permanent basis. The judgment of the court of appeals should be reversed.

ARGUMENT

I. THE FRAMERS OF THE U.S. CONSTITUTION RECOGNIZED THAT THE PRESIDENT'S ABILITY TO STAFF THE EXECUTIVE BRANCH WAS CRITICALLY IMPORTANT

Article II of the U.S. Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. The Constitution's establishment of a "single, independent Executive" was a direct response to perceived infirmities of the Articles of Confederation, which had vested executive authority in the Continental Congress, Arts. of Confed. art. IX, §§ 4, 5. *See, e.g.*, *The Federalist No. 70* (Alexander Hamilton) ("all men of sense will agree in the necessity of an energetic Executive"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 Yale L.J. 541, 599-603 (1994) ("the Constitution's clauses relating to the President were drafted and ratified to energize the federal government's administration and to establish one individual accountable for the administration of federal law"); *cf.* Akhil Reed Amar, America's Constitution: A Biography 131 (2005) ("The Constitution's 'President' . . . bore absolutely no resemblance to the 'president' under the Articles of Confederation.").

This new President was given the responsibility to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3; *Myers*, 272 U.S. at 117 (1926) ("The vesting of the executive power in the President was essentially a grant of the power to execute the laws."), and, alone among the government offices established by the new Constitution, was required to "be on duty continuously" Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Consti-*

tutional Questions, 26 Cardozo L. Rev. 377, 378 (2005); see 12 Op. Att'y Gen. 32, 35 (1866) ("it is of the very essence of executive power that it should always be capable of exercise"). Thus, unlike Congress, which was required only to "assemble at least once in every Year," U.S. Const. art. I, § 4, cl. 2, and could, on consent, adjourn as it saw fit, *id.* art. I, § 5, cl. 4, the President was always acting to execute the laws. *See* 4 Debates in the Several State Conventions on the Adoption of the Federal Constitution 135 (Elliot ed. 1836) (contrasting Congress, who "are not to be sitting at all times," with the President, who is "perpetually acting for the public"); Amar, America's Constitution, *supra*, at 132 ("While the new Congress would go in and out of session, America itself would always be in session, as would the nation's new presiding officer.").

Given the significant responsibility with which the President was entrusted, the Framers recognized that he must have subordinate officials to aid him in executing the laws. Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 719 ("If the president is to be an effectual executive, he must have the aid of others, otherwise his power to execute the law is chimerical."). Thus, "the Constitution provide[d] for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'" *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010) (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)). Specifically, Article II expressly provided the President with the Power to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," U.S. Const. art. II, § 2, cl. 1.

As the Framers understood, "[t]he ingredients which constitute energy in the Executive are . . . an adequate provision for its support." *The Federalist No. 70* (Alexander Hamilton); *The Federalist No. 72* (Alexander Hamilton) (recognizing that there would be "assistants or deputies of the chief magistrate" who "ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence"). Indeed, this Court has long recognized that "the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates." *Myers*, 272 U.S. at 117; *Free Enter. Fund*, 130 S. Ct. at 3146 (noting that officers to aid the President were necessary "[i]n light of '[t]he impossibility that one man should be able to perform all the great business of the State'" (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939))). It is thus of critical importance that the President be able to fill in a timely manner vacancies in senior executive branch positions. *See, e.g.*, Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. Cal. L. Rev. 913, 937-38 (2009) ("Vacancies in key executive agency positions have several deleterious consequences for policymaking. These effects include agency inaction, confusion among nonpolitical workers, and decreased agency accountability."); Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 Yale L.J. 940, 953-54 (2013) ("The sheer breadth of the federal government's many functions means that the President cannot perform [his] constitutional task without assistance. . Thus, the inability of the President to staff the most senior offices of the executive branch makes it extraordinarily difficult for the President to fulfill [his] constitutional function.").

Thus, while the Framers provided that the Senate should offer its advice and consent to certain presidential nominees in order to prevent abuses of power, *see Edmond v. United States*, 520 U.S. 651, 659 (1997) (noting that Senate involvement could "curb Executive abuses of the appointment power"); 3 Joseph Story, Commentaries on the Constitution of the United States § 1525 (Senate's advise-and-consent function would make the President "more circumspect, and deliberate in his nominations for office"), they also sought to ensure that the President, who would remain continually in service, could make temporary appointments even when the Senate was not available to perform its advice-and-consent function. U.S. Const. art. II, § 2, cl. 3; *see Nat'l Labor Relations Bd. v. Canning*, 134 S. Ct. 2550, 2559 (2014) ("the Recess Appointments Clause reflects the tension between, on the one hand, the President's continuous need for 'the assistance of subordinates,' and, on the other, the Senate's practice, particularly during the Republic's early years, of meeting for a single brief session each year" (internal citation omitted)). As was noted during the debates over the Constitution's ratification, if the President did not have the power to make appointments while the Senate was in recess, "such neglect may occasion public inconveniences." 4 Debates in the Several State Conventions, *supra*, at 135; *see The Federalist No. 67* (Alexander Hamilton) (noting that it "might be necessary for the public service to fill [vacancies] without delay").

Recognizing how important it was that the President be able to staff executive branch vacancies, Congress has long given the President the authority to temporarily fill vacancies while the Senate confirmation process is ongoing, albeit often subject to specified limitations. As early as 1792, the Second Con-

gress enacted a law providing for the temporary appointment of executive branch officers: "'in case of the death, absence . . . or sickness' of the Secretaries of State, Treasury or the War Department, or of any officer in those departments, 'it shall be lawful for the President . to authorize any person or persons at his discretion to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease.'" *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 210 (D.C. Cir. 1998), *superseded by statute on other grounds*, FVRA, Pub. L. No. 105-277, 112 Stat. 2681 (quoting Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281); *see also* Pet'r Br. 4. In 1863, Congress "expand[ed] the President's power to fill vacancies in 'any Executive Department of the Government,'" *Doolin, 139 F.3d at 210* (quoting Act of Feb, 20, 1863, ch. 45, 12 Stat. 656), though it restricted the President's choices in certain respects, *id.* In 1868, "Congress repealed the existing statutes on the subject of vacancies and enacted in their stead a single statute reflecting prior law," *id.*, and Congress has amended the law a number of times in the intervening years, *see id.* (discussing that history).

The FVRA is the current incarnation of that law, allowing the President to temporarily fill vacancies in senior executive branch positions, subject to certain specified limitations. By interpreting one of those limitations too broadly, the court below undermined the President's ability to temporarily fill executive branch vacancies with the individua's best equipped to fill them permanently. That interpretation of the FVRA is at odds with the law's text and history, as the next Section discusses.

II. THE DECISION OF THE COURT BELOW IS AT ODDS WITH THE TEXT AND HISTORY OF THE FEDERAL VACANCIES REFORM ACT

As its name suggests, the Federal Vacancies Reform Act was enacted to reform the procedures for temporarily filling senior executive branch vacancies that can be permanently filled only by presidential appointment and Senate confirmation. *See, e.g.*, 144 Cong. Rec. S6414 (June 16, 1998) (statement of Sen. Thompson) ("When a vacancy occurs in [an important executive branch office], it is important to establish a process that permits the routine operation of the government to continue, but that will not allow the evasion of the Senate's constitutional authority to advise and consent to nominations."); *id.* at S12861 (Oct. 21, 1998) (statement of Sen. Lieberman) (FVRA designed to "reassert[] the Senate's constitutional rights while at the same time avoid creating an unwarranted risk to the Government's good functioning").

First, the FVRA sets out a default rule, providing that "[i]f an officer of an Executive agency . . dies, resigns, or is otherwise unable to perform the functions and duties of the office . the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity . . . ." 5 U.S.C. § 3345(a)(1). Second, the law provides that "the President (and only the President)" may "notwithstanding [the default rule set out in § 3345(a)(1)]," direct someone else to temporarily fill the position: (1) a person who already serves in a Senate-confirmed position, *id.* § 3345(a)(2); (2) a person who has served in a senior position (i.e., one with a rate of pay equal to the minimum for GS-15 or higher) in the agency for at least 90 days in the year preceding the vacancy, *id.* § 3345(a)(3), or (3) a person

who has been nominated "for reappointment for an additional term to the same office" until the Senate confirms or rejects the nomination, *id.* § 3345(c)(1).

The law also provides a limitation on the circumstances in which the first assistant can temporarily fill the vacancy, providing that "[n]otwithstanding subsection (a)(1) [the default rule that the first assistant fills the vacancy], a person may not serve as an acting officer for an office under this section" if the President nominates him to fill the vacant office permanently and he "served in the position of first assistant" for less than 90 days during the year preceding the vacancy. *Id.* § 3345(b)(1). In other words, the President cannot nominate someone and, at the same time, make him the first assistant, so that he automatically fills the vacancy while his nomination is pending. This restriction does not apply if the person nominated "is serving as the first assistant to the office of an officer described under subsection (a)" and that first-assistant position is itself an office to which the individual has been confirmed by the Senate. *Id.* § 3345(b)(2).

Respondent argues, and the court below held, that the limitation in subsection (b)(1) does not simply limit the circumstances in which a *first assistant* can temporarily fill the office if he or she has also been nominated to fill it permanently. Instead, according to the court below, subsection (b)(1) also limits the circumstances in which the President can name *anyone* to fill the vacancy temporarily if the President has also chosen to nominate that person to fill the position permanently. This conclusion, which would prevent some career officials "from serving [temporarily] if the President also regarded them as most qualified to occupy the . . . position at issue on a

permanent basis," Pet'r Br. 23, is at odds with the text and history of the law.

To start, the relevant limitation in subsection (b)(1) applies, by its terms, only to subsection (a)(1), which governs when first assistants automatically fill the vacancy. *See* 5 U.S.C. § 3345(b)(1) ("[n]otwithstanding *subsection (a)(1)*, a person may not serve as an acting officer . . " (emphasis added)). In other words, subsection (b)(1), like subsections (a)(2) and (a)(3), operates as an exception to the default rule: even if the President does not direct someone else to fill the vacancy pursuant to (a)(2) or (a)(3), the first assistant cannot fill the vacancy if the President has nominated him to fill the office permanently *and* he served as first assistant for less than 90 days in the year preceding the vacancy, unless subsection (b)(2) applies. Had Congress wanted subsection (b)(1) to apply to all three mechanisms for temporarily filling a vacancy set out in subsection (a), it could easily have said so by providing that "[n]othwithstanding *subsection (a)*, a person may not serve as an acting officer" if the specified conditions exist.

That Congress wrote the law in the way that it did makes complete sense because that text, read naturally, accomplishes exactly what Congress set out to do when it enacted the FVRA. *King*, 135 S. Ct. at 2496 ("[I]n every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan."). As the legislative history of the FVRA makes clear, the FVRA was a direct response to perceived violations of the Appointments Clause by the executive branch. *See, e.g.*, S. Rep. No. 105-250 (1998) ("the Senate's confirmation power is being undermined as never before"); 144 Cong. Rec. S6413 (June 16, 1998) (statement of

Sen. Thompson) ("This legislation is needed to preserve one of the Senate's most important powers: the duty to advise and consent on presidential nominees. . . [T]he Vacancies Act is honored more in the breach than in the observance.").

Among other things, members of the Senate objected to the fact that an individual who the Senate had refused to confirm to the position of Assistant Attorney General was allowed to effectively fill the office anyway as a temporary appointee. *See* O'Connell, *supra*, at 933 ("Frustrated by President Clinton's reliance on temporary appointees, including Bill Lann Lee as head of the Department of Justice's Civil Rights Division, congressional Republicans pushed through the Federal Vacancies Reform Act of 1998."); *see also* 144 Cong. Rec. S11028 (Sept. 28, 1998) (statement of Sen. Thurmond) ("Most recently, the President installed Bill Lann Lee as Acting Chief of the Civil Rights Division in blatant disregard of the Judiciary Committee's decision not to support his controversial choice. Mr. Lee has been serving as Acting Chief for ten months, and the President apparently has no intentions of nominating someone the Judiciary Committee can support."); *cf. id.* at S11033 (statement of Sen. Leahy) (urging the Senate to vote on Lee's nomination).[2]

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[2] Other concerns that motivated enactment of the FVRA included the fact that "[s]ince 1973 the Department [of Justice] ha[d] continued to make acting appointments outside the strictures of the Vacancies Act," 144 Cong. Rec. S11021 (Sept. 28, 1998) (statement of Sen. Thompson); *see also id.* at S11028 (statement of Sen. Durbin) ("There has been flagrant and contagious disregard for the application of the existing law as the sole mechanism for temporarily filling advise and consent positions while awaiting the nomination and confirmation of the official candidate."), and the issuance of a D.C. Circuit decision holding that the Vacancies Act did not "specify when the President must

To address that problem, the FVRA was designed to prevent the President from circumventing the Senate's advice-and-consent role by nominating someone from outside government to fill a vacancy and, at the same time, making him first assistant so that he could immediately begin performing the duties of the office in an acting capacity. Congress believed that imposing a requirement on "the length of service of the first assistant eligible to be both the nominee and the acting officer" would "prevent manipulation of first assistants to include persons highly unlikely to be career officials." S. Rep. No. 105-250, at 13. And that is exactly what subsection (b)(1) does—imposing a length of service requirement on first assistants who are also nominated to fill the post permanently. Notably, subsections (a)(2) and (a)(3) did not present the same concern as subsection (a)(1) because they contained their own internal limitations that prevented their use as a means of circumventing the advice-and-consent process. Subsection (a)(2) applies only when an individual has already been confirmed by the Senate, and subsection (a)(3) includes its own requirement that the senior agency official have been serving in the position for at least 90 days during the year preceding the vacancy.

Significantly, an early version of the FVRA (the one that was voted out of the Senate Committee) contained provisions substantively parallel to subsections (a)(1) and (a)(2), that is, a default provision under which the first assistant automatically filled the vacancy and another provision under which the President could designate an individual who had been Senate-confirmed to a different position. The text of

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undertake the filling of [a] position," S. Rep. No. 105-250, at 6; *see* Pet'r Br. 6-7.

that earlier version left absolutely no doubt that the limitations on service by individuals who were nominated to fill the position permanently applied only to first assistants, not to individuals holding Senate-confirmed positions, S. Rep. No. 105-250, at 25, as the court below acknowledged, *see* Pet. App. 19a (noting that the earlier version "of subsection (b) manifestly applies to first assistants only"). So far as *amicus* is aware, nothing in the FVRA's legislative history suggests that subsequent amendments to the bill were intended to expand that limitation to apply beyond first assistants. To the contrary, subsequent amendments to the bill were intended to give the President *more* flexibility, not less, in determining who should fill vacancies on a temporary basis. Specifically, some Senators suggested "allow[ing] a third category of individuals to temporarily fill positions, such as . . . qualified individuals who have worked within the agency in which the vacancy occurs for a minimum number of days and who are of a minimum grade level," S. Rep. 105-250, at 31, and they urged that "the length of service requirement for first assistants who are nominees . . . be reevaluated," *id.*; *see* 144 Cong. Rec. S11027 (Sept. 28, 1998) (statement of Sen. Levin) ("the bill restricts who can be an acting official . to a first assistant or another advice and consent nominee. That is too restrictive a pool of acting officials and does not give this administration, or any administration, the ability to make, for instance a long-time senior civil servant within the agency an acting official"); *id.* at S11032 (statement of Sen. Glenn) ("I intend to offer an amendment to add a third category which would include qualified individuals of a certain level or higher who are already within an agency in which a vacancy occurs. . . This gives the President a larger pool from which to choose an acting official . . . "); *id.* ("I hope to offer an

amendment which would further decrease the requirement for a first assistant who will be an acting officer and the nominee to 45 days."); *id.* at S12861 (Oct. 21, 1998) (statement of Sen. Lieberman) ("I am particularly pleased that the final version of the bill resolves one of my biggest concerns—that we not define who may serve as an acting official in a manner that, in some cases, effectively precludes anyone from serving in an acting capacity. The final version of the bill well addresses this problem by offering the President the option to choose any senior agency staff who has worked at the agency for at least 90 days to serve as the acting official.").

The version that was ultimately enacted into law addressed these concerns. First, subsection (a)(3) was added to allow for the designation of long-serving senior agency officials. *Id.* at S12822 (Oct. 21, 1998) (statement of Sen. Thompson) ("[a] third category of 'acting officer' is now permitted apart from first assistants and presidentially designated persons who have already received Senate-confirmation to hold another office"). As Senator Thompson explained, this change addressed "[c]oncerns . . . that, particularly early in a presidential administration, there will sometimes be vacancies in first assistant positions, and that there will not be a large number of Senate-confirmed officers in the government" and that it might be problematic to "designat[e] too many Senate-confirmed persons from other offices to serve as acting officers in additional positions." *Id.* Second, subsection (b)(1) was amended to reduce the time-in-service requirement for first assistants. *Id.* ("The 180 day period in § 3345(b) governing the length of service prior to the onset of the vacancy that the first assistant must satisfy to be eligible to serve as the acting officer is reduced to 90 days.").

As the government argues, it makes little sense to think that these amendments that were adopted to give the President *more* flexibility in his choice of acting officers also expanded the *restriction* in subsection (b)(1) on serving as an acting officer after being nominated, so that the restriction would apply not only to first assistants, but also to persons designated by the President pursuant to subsections (a)(2) and (a)(3). Pet'r Br. 40 ("Under the court of appeals' view, Congress expanded the categories of officials eligible for acting service to [ensure the most qualified individual fills the position] . . but then imposed a requirement in Subsection (b)(1) that would essentially disqualify such officials from serving if the President concluded (as he did in this case) that such an official was so highly qualified that the official would also be the appropriate permanent choice."). Moreover, of great relevance here, in explaining these changes, Senator Thompson made clear that the limitations in subsection (b)(1) only applied to first assistants who automatically assumed the position of acting officer pursuant to subsection (a)(1): "[u]nder § 3345(b)(1), the revised reference to § 3345(a)(1) means that this subsection applies only when the acting officer is the first assistant, *and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3).*" 144 Cong. Rec. S12822 (Oct. 21, 1998) (statement of Sen. Thompson) (emphasis added).[3]

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[3] The court below discounted the significance of this statement, noting that "Thompson was immediately contradicted by Senator Byrd Byrd's statement hewed much more closely to the statutory text and suggested that subsection (b)(1) applies to all categories of acting officers. Thus the floor statements are a wash." Pet. App. 17a-18a. But the statement of the prime sponsor of the legislation—the sponsor who made the relevant amendment to the legislation (144 Cong. Rec. S10996 (Sept. 25, 1998) (statement of Sen. Thompson)) and who was specifically

In sum, the FVRA was enacted to prevent circumvention of the Senate's role in providing advice and consent to the President's executive branch nominees, while also ensuring that the President has sufficient flexibility to temporarily fill those offices until the Senate can provide its advice and consent. Properly interpreted, it does exactly that. The decision of the court below, however, is at odds with the statute's text, as well as Congress's legislative plan in enacting it. Moreover, it would undermine the President's ability to temporarily staff important executive branch offices with the individuals that the President believes best equipped to fill the vacancies on a permanent basis. That decision should not stand.

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explaining the effect of that amendment and how the amended provision would operate—should not be so lightly dismissed simply because of Senator Byrd's imprecise paraphrasing of the statute's text in the context of giving a more general overview of the bill. Indeed, Senator Byrd's paraphrasing of the text was imprecise in another respect, as well. Senator Byrd stated that a person had to be first assistant *at the time of the vacancy*, whereas the statute clearly provides that the person need only have served as first assistant during the year preceding the vacancy. *Compare* 144 Cong. Rec. S12824 (Oct. 21, 1998) (statement of Sen. Byrd) ("a person may not serve as an acting officer if: (1)(a) he is not the first assistant, or (b) he has been the first assistant for less than 90 of the past 365 days, and has not been confirmed for the position; and (2) the President nominates him to fill the vacant office"), *with* 5 U.S.C. § 3345(b)(1) ("a person may not serve as an acting officer if—(A) during the preceding 365-day period preceding [the vacancy], such person (i) did not serve in the position of first assistant to the office of such officer; or (ii) served in the position of first assistant to the office of such officer for less than 90 days; and (B) the President submits a nomination of such person ").

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SW GENERAL, INC.,
DOING BUSINESS AS SOUTHWEST AMBULANCE,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* SENATORS JOHN MCCAIN AND THOM TILLIS URGING AFFIRMANCE

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Other Authorities

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INTEREST OF *AMICI CURIAE*[1]

Senator John McCain of Arizona has served in the Senate since 1987, and was the Republican presidential nominee in the 2008 United States presidential election. Senator McCain is Chairman of the Senate Committee on Armed Services; Member and former Chairman of the Senate Committee on Indian Affairs; and Member of the Senate Committee on Homeland Security and Governmental Affairs. Senator McCain supported the FVRA when it was introduced in Congress and voted for its final passage.

Senator Thom Tillis of North Carolina has served in the Senate since 2015. Senator Tillis is a Member of the Senate committees on the Judiciary; Armed Services; Veterans Affairs; Agriculture, Nutrition and Forestry; and the Senate Special Committee on Aging.

The United States Senate is responsible under Article I of the Constitution for enacting legislation and under Article II of the Constitution for providing advice and consent on presidential nominees. *Amici* are filing this brief because, as U.S. Senators with extensive experience in vetting and confirming presidential nominees, they have a substantial interest in preventing the President from circumventing Congress's constitutionally mandated role in the process

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* and their counsel contributed monetarily to the preparation or submission of this brief.

of appointing top government officials. The interpretation of the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345, *et seq.*, pressed by the petitioner is contrary to the statute's plain text and Congress's intent in enacting it. *Amici* have an interest in maintaining the integrity of the Senate's constitutionally prescribed advice-and-consent powers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although this case presents a seemingly arcane question about the proper interpretation of the Federal Vacancies Reform Act, 5 U.S.C. § 3345, *et seq.* ("FVRA"), answering that question correctly is vital to preserving the integrity of the Appointments Clause, which protects individual liberty by diffusing the power to install high government officials between the Senate and the President.

The Appointments Clause is a vital structural protection of the Constitution that safeguards the separation of powers and individual liberty. The norm under this clause is that all officers of the United States are subject to consideration and confirmation by the Senate. However, Congress has historically enacted legislation that permits the President to fill offices on a temporary basis to permit the government to continue to function during vacancies. This power has always been limited in order to prevent the President from using it to circumvent the Appointments Clause.

In 1998, after several decades of presidential abuse of the power to appoint temporary officers, Congress passed the FVRA to reform that process. Under this statute, a nominee cannot, while they await Senate confirmation, serve as an acting officer in the position they were nominated to fill. Congress enacted this bar to prevent circumvention of the Appointments Clause by presidents who install their nominees in acting positions solely for the purpose of having them in place as the Senate considers the nomination. The only exception to this prohibition is

a narrow one: current first assistants, as well as Senate-confirmed first assistants, other Senate confirmees, and high-ranking civil servants, who have been the first assistant to the office they are nominated to for at least 90 days in the prior year. This narrow exception to the bar on nominees serving as acting officers balanced Congress's overriding goal of preventing circumvention of the Appointments Clause while also meeting the practical need to keep the government running during vacancies. This scheme is considered and reasonable, and is plainly stated in the text of the FVRA.

In passing the FVRA, Congress took aim at abuses that had occurred in the decades before its passage. But its goal was broader than just preventing those specific abuses. The Court should not (as petitioner here suggests) interpret its provisions in light of those past controversies, but broadly in light of Congress's evident purpose to maintain the integrity of the advice-and-consent process and the constitutional separation of powers. Reading the text in light of that intent, it is clear that Congress crafted only a narrow exception to the FVRA's prohibition on nominees serving as acting officers, in order to limit the danger of presidential circumvention.

Nor does the post-enactment practice of the President and the Senate have any interpretive significance. Congress's supposed "silence" in the face of occasional nominees who have improperly served as acting officers is not, in these circumstances, evidence of its "acquiescence" in the Executive Branch's misinterpretation of the FVRA. Rather, this silence reflects the structure of the FVRA, which explicitly

invites enforcement of the statute by private litigants in the first instance. Petitioner cannot reasonably argue that Congress's action in passing a statute that plainly limits who may serve as an acting officer and then inviting private enforcement of that provision constitutes acquiescence in the Executive Branch's misreading of the plain text of the FVRA.

ARGUMENT

I. In Enacting the FVRA, Congress Acted Broadly To Prevent the President from Circumventing the Appointments Clause.

The Constitution empowers the President to appoint "Officers of the United States" to carry out the functions of government; but that appointment power can only be exercised "by and with the Advice and Consent of the Senate." U.S. CONST. art. II, § 2, cl. 2. Generally speaking, while the President may nominate persons to serve as officers of the United States, those persons cannot assume their duties and exercise the powers of their offices until the Senate consents to their appointments. *See id.*; *see also NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014).

This constitutional mandate of congressional approval of presidential appointments "is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (citing *Buckley v. Valeo*, 424 U.S. 1, 128–31 (1976) (per curiam)). The Crown's abuse of the power to appoint officers was one of the most important grievances that led to the Revolution. *See* L. Kinvin Wroth & Hiller B. Zobel, eds., 2 *Legal Papers*

of John Adams 140, 142 (1965) (complaining that the Crown's unchecked power to appoint officers to execute warrants put "the liberty of every man in the hands of every petty officer"); Declaration of Independence ¶ 12 (1776) (condemning the Crown for erecting "a multitude of New Offices" and sending "hither Swarms of Officers to harass our People, and eat out their Substance"). To prevent such abuses, the Framers enacted the Appointments Clause to "ensure that those who wielded [the appointment power] were accountable to political force and the will of the people." *Freytag v. C.I.R.*, 501 U.S. 868, 884 (1991).

The advice-and-consent power is thus essential to the constitutional scheme of checks and balances. It serves as "a bulwark against one branch aggrandizing its power at the expense of another branch." *Ryder v. United States*, 515 U.S. 177, 182 (1995). It also helps to safeguard individual liberty and ensure that high government officials, though not directly elected, are nonetheless democratically accountable. *See* THE FEDERALIST NO. 39 (Madison) (through the Appointments Clause, the "officers of the Union, will ... be the choice, though a remote choice, of the people themselves"). *See also* S. Rep. No. 105-250, at 8 (July 15, 1998) ("Like other structural constitutional provisions, the Appointments Clause was designed to protect the liberty of the people."). The Constitution recognizes only two exceptions to the advice-and-consent requirement: the narrow power to make temporary recess appointments, *see* U.S. CONST. art. II, § 2, cl. 3, and Congress's discretion to "vest the appointment of ... inferior officers, as [it] think[s]

proper, in the President alone, in courts of law. or in the heads of departments," *id.* § 2, cl. 2.

Recognizing the necessity of ensuring the continued functioning of the government, Congress has long delegated to the President the authority to appoint acting officers in case of the death, resignation, or incapacity of a Senate-confirmed officer. But to discourage the President from relying on acting officers to diminish its constitutional role in the appointment process, Congress has sharply cabined that authority, generally by limiting the kinds of officials who can serve in an acting capacity and the length of time they can serve. *See* Resp. Br. 4–6 (recounting the evolution of Congressional acts to permit temporary appointments of acting officials in case of death, resignation, or incapacity of Senate-confirmed officials).

In enacting the FVRA in 1998, Congress sought to preempt "aggressive claims of exemption" from the then-current Vacancies Act that were being pressed by the Department of Justice and other executive agencies. S. Rep. No. 105-250 at 4. At the time, the Justice Department maintained that under the department's organic statute, the Attorney General could appoint officials to serve in an acting capacity in positions that required senatorial approval for an unlimited period of time. *Id.*

The Department's aggressive stance reached its apotheosis with the appointment of Bill Lann Lee to serve as Acting Assistant Attorney General for Civil Rights. Mr. Lee was nominated to the position in 1997; by the fall, the members of the Senate Judiciary Committee had announced their positions on his

nomination, making clear that it would fail. Committee Democrats prevented a formal vote and, pursuant to Senate Rule XXXI, the committee sent the nomination back to the White House at the next adjournment.[2] Peter Baker, *White House May Use Recess Appointment for Lee*, WASH. POST, Nov. 15, 1997, at A9. Rather than resubmit the nomination or make a recess appointment of Mr. Lee, President Clinton designated him as first assistant to the civil rights division of the Department of Justice, and then as Acting Assistant Attorney General for that division. *See* Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* 2 (Jan. 14, 1998). Until his later recess appointment to the position, Mr. Lee thus exercised the considerable powers of an important advice-and-consent position for nearly two-and-a-half years, far longer than the permitted time, without ever obtaining the consent of the Senate. *See* Resp. Br. 9–10.

Petitioner, in its brief to this Court, has focused narrowly on the Lee nomination and on the way in which the FVRA was designed to prevent "gaming" of the Vacancies Act by installing first assistants who

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[2] Section 6 of Senate Rule XXXI states: "Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President."

would then assume the powers of advice-and-consent positions in an acting capacity for unlimited periods of time. *See* Pet. Br. 38, 42. The FVRA was undoubtedly enacted, in part, to prevent this and similar abuses. *See* S. Rep. No. 105-250 at 5.

But Congress's intent in enacting the statute was broader than just preventing a reprise of the Lee nomination. Rather, the FVRA was written with broader goals in mind: "maintain[ing]" the Constitution's separation of powers by ensuring that officers are subjected to "the scrutiny of the Senate for the benefit of the liberty of the people." *Id.* The FVRA is appropriately interpreted not just as a means of preventing another Lee nomination, but in a way that gives effect to this congressional intent to prevent "outright circumvention" of the "vital constitutional 'safeguard'" of the Appointments Clause. 144 Cong. Rec. 27,497 (Oct. 21, 1998) (statement of Senator Robert Byrd). Ultimately, the FVRA was enacted in the belief that "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers," and to prevent such transgressions. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

II. To Prevent the President from Circumventing Its Advice-and-Consent Power, Congress Limited the President's Power To Install a Nominee as an Acting Officer.

One of the abuses that Congress sought to curb by enacting the FVRA was the circumvention of the Appointments Clause that occurs when the President nominates someone to an office requiring the Senate's advice and consent, but the nominee is also al-

lowed to serve as an acting officer while her nomination is pending. The statute's anti-circumvention principle is equally implicated whether the nominee becomes an acting officer because she is a first assistant, a confirmed appointee from elsewhere within the government, or a high-ranking civil servant within the agency—*i.e.*, whether through operation of subsection (a)(1), (a)(2), or (a)(3) of Section 3345. Because all three types of acting officers present the same kinds of separation-of-powers concerns, Congress limited the ability of individuals in each of the three categories to serve as acting officers while their nominations are pending before the Senate.

A. Section 3345(b)(1) Plainly Applies to All Acting Officers Who Assume Their Positions Pursuant to Section 3345.

Section 3345(b)(1) is the means by which Congress sought "to prevent [the President from] placing an employee in an agency simply for the purpose of having him in place while his nomination is pending." Morton Rosenberg, Cong. Research Serv., *The New Vacancies Act: Congress Acts to Protect the Senate's Prerogative* 9 (Nov. 2, 1998). Section 3345(a)(1) mandates that the current first assistant to the office where the vacancy occurs becomes the acting officer, limited to the time constraints contained in 5 U.S.C. § 3346. The President can forestall that self-executing provision by appointing another Senate-confirmed officer or a high-ranking civil servant pursuant to, respectively, Section 3345(a)(2) or (a)(3). These provisions are a practical and narrow exception to the constitutional norm that permits "someone who has not received Senate confirmation for

that particular post to serve temporarily to keep the government functioning." S. Rep. No. 105-250 at 8. However, Congress explicitly directed that a *nominee* for an office may not become the acting officer "under this section"—*i.e.*, under Section 3345 generally—if that person "did not serve in the position of first assistant to the office of such officer," or did so for less than 90 days in the past year. 5 U.S.C. § 3345(b)(1).

Amici join fully respondent's interpretation of the plain text of these provisions. Resp. Br. 22–32. The statutory reference to a nominee becoming an acting officer "under this section" clearly refers to all of the ways in Section 3345 by which a person may become the acting officer—whether automatically under subsection (a)(1) because the nominee is the current first assistant, or by designation of the President under subsections (a)(2) or (a)(3). The use of the phrase "under this section" to refer to the entirety of the section of an act in which that phrase appears is consistent with congressional legislative drafting practice, which organizes the components of statutes into a descending hierarchy of sections, subsections, paragraphs, subparagraphs, and clauses. *House Legislative Counsel's Manual on Drafting Style*, HLC No. 104-1, p. 24 (1995); *see also* Senate Office of the Legislative Counsel, *Legislative Drafting Manual* 10 (1997). The Court should give "under this section" its plain and ordinary meaning, which is that the provisions of subsection (b)(1) apply to all of the other provisions in the statutory section in which subsection (b)(1) appears. *See S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 377 (2006) (statutory terms should be given their plain and ordinary meaning).

B. Respondent's Interpretation of the FVRA Is Consistent with Clearly Expressed Congressional Intent.

Moreover, respondent's interpretation is consistent with the intent of the FVRA, which is to preserve the integrity of the advice-and-consent process, assure democratic accountability of high government officials, and prevent the President from circumventing the Appointments Clause. The danger of circumvention is not lessened because a nominee is a confirmed appointee in another office or a high-ranking civil servant, rather than a first assistant. What raises separation-of-powers concerns is not simply that an unconfirmed nominee becomes an acting official by virtue of having been a recently appointed first assistant, but that an unconfirmed nominee becomes an acting official by *any* means.

"[T]he Founders intended ... Senate approval [of principal government officers] to be the norm." *Noel Canning*, 134 S. Ct. at 2558. The FVRA departs from that constitutional norm in a narrow set of circumstances, in order to permit government agencies to function during vacancies. *See* 144 Cong. Rec. 12,432 (June 16, 1998) ("[I]t is important to establish a process that permits the routine operation of the government to continue [when a vacancy occurs], but that will not allow the evasion of the Senate's constitutional authority to advise and consent to nominations.") (statement of Senator Fred Thompson). But the constitutional norm still has considerable force in the way acting officers actually operate. Though acting officers are generally vested with the full powers of their office, commentators have noted that in prac-

tice, they are frequently caretakers, reluctant to enact dramatic policy shifts or depart substantially from the status quo. *See, e.g.*, Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 942 (2009) ("Acting officials will generally lack sufficient authority to direct [career civil servants] beyond the most basic agency functions.").

This circumspection is understandable and, indeed, appropriate: An acting officer is neither the hand-picked appointee of the President for a specific position, whose actions can be presumed to reflect the President's program, nor a Senate-confirmed officer whose actions are cloaked in the democratic accountability and political legitimacy conferred by the advice-and-consent process. However, an acting official who is *also* the President's nominee unbalances this equation, endowing that acting official with the force and energy of the President's appointment without the constraining counterbalance of the Senate's consideration and confirmation. This dynamic works to undermine democratic accountability and the constitutionally mandated separation of powers embodied in the Appointments Clause.

To prevent the President from circumventing the advice-and-consent process, in passing the FVRA, Congress determined to permit nominees to serve as acting officials only in the narrow circumstance where the nominee either currently serves or recently served (for the prescribed 90 days within the past year) as the first assistant. This narrow exception balances the overriding concern of preventing circumvention of the Appointments Clause against the

practical reality that a current or recent first assistant will frequently be the most qualified candidate to serve in an acting capacity before confirmation *and* on a permanent basis after confirmation, since they have been previously been closely involved in the administration of that office. Insofar as the FVRA constitutes an exception to the constitutional norm against unconfirmed persons serving as officers, that exception must be read in light of both the general rule against "reading legislation, absent [a] clear statement," in a way that raises "[s]eparation-of-powers concerns," *Kucana v. Holder*, 558 U.S. 233, 237 (2010), and Congress's evident purpose of maintaining the integrity of the advice-and-consent process.

Read fairly, Section 3345 does not undermine Congress's anti-circumvention purpose, but strikes a balance against the need to provide for the smooth functioning of the government during vacancies. As current or recent first assistants are many times drawn from the apolitical ranks of the civil service, or at the higher level are presidentially appointed and Senate-confirmed principal deputies, Congress determined that the danger of circumvention presented by their service as acting officers for a limited time while their nomination is considered—while not nonexistent—was limited to the greatest extent practically possible. *See* S. Rep. No. 105-250 at 13. That Congress could have gone further and prevented even current or recent first assistants from serving as acting officers while their nominations were pending does not negate the meaning of the statute's plain text and clearly expressed intent. *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) "'[N]o legis-

lation pursues its purposes at all costs.'") (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam)). The Court should give full effect to this deliberate determination.

The instant case highlights the importance of the congressional intent that nominees who have not been confirmed by the Senate should generally not occupy positions for which the Constitution requires senatorial advice and consent. Lafe Solomon's nomination to be general counsel of the NLRB was, like Mr. Lee's nomination to head the civil rights division, never taken up by the Senate. Nonetheless, Mr. Solomon occupied, as an acting official, a position that has broad "final authority" to investigate and prosecute complaints of unfair labor practices. 29 U.S.C. § 153(d). This power is "independent[] of any direction, control, or review by" the board of the NLRB. 1 *Legislative History of the Labor Management Relations Act, 1947*, at 541 (1985 ed.). Rather, the NLRB general counsel is "ultimately responsible" only to "the President and Congress." *Id.* The general counsel's power is so broad that Congress limited how long an acting official can serve in that role if the President has not named a permanent nominee, reflecting concerns about allowing unconfirmed officials to exercise this expansive authority. *See* 29 U.S.C. § 153(d). Yet Mr. Solomon occupied that office, with its considerable powers, for more than three years without Senate confirmation.

As this case amply demonstrates, permitting the President's hand-picked nominee to occupy an advice-and-consent position in an acting capacity without Senate confirmation undermines the separation-of-

powers and democratic-accountability principles of the Appointments Clause. This case is thus an example of the kind of "outright circumvention" of a "vital constitutional 'safeguard'" that the FVRA was designed to prohibit. 144 Cong. Rec. 27,497.

III. Petitioner's Arguments from Executive Practice Cannot Overcome Plain Statutory Language and Congressional Intent to Limit Nominees Serving As Acting Officers.

A central argument advanced by petitioner comes from Congress's supposed "acquiescence" by failing to object to nominees who were not current or recent first assistants serving in an acting capacity. Pet. Br. 49–55. That argument is unavailing.

As a starting matter, congressional silence in the face of the Executive Branch's misinterpretation of the FVRA—even assuming that Congress *has* been silent, an assumption that is not warranted, *see* Pet. Br. n.8—is no reason to disregard plain statutory text. "It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval" of a statutory interpretation. *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (citation omitted). Where Congress *re*enacts statutory language that has acquired a settled meaning, that may indicate congressional acquiescence in that settled meaning. *See Keene Corp. v. United States*, 508 U.S. 200, 212 (1993). But "'[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction.'" *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (quoting *Pension Benefit Guar-*

anty Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)). This includes the inference that—far from signaling acquiescence—congressional silence reflects nothing more than the reality that "the Senate cannot easily register opposition as a body to every governmental action that many, perhaps most, Senators oppose." *Noel Canning*, 134 S. Ct. at 2564. Text and congressional intent control statutory meaning, and in this case they clearly indicate that the Executive Branch has misinterpreted the FVRA. *Supra* at 10–14.

One inference to be drawn from any congressional "silence" is that Congress intended for private parties to take the lead in objecting to executive branch abuses of the FVRA. The statute's enforcement mechanism states that actions taken by acting officers who are serving in violation of the FVRA "shall have no force or effect." 5 U.S.C. § 3348(d)(1). Private parties affected by actions taken by officers who are serving in violation of the FVRA would have standing to challenge those actions on the basis of that invalidity. To the extent Congress has been silent regarding the Executive Branch's misinterpretation of the FVRA, that silence is explained by its expectation that private litigants "will raise noncompliance with this legislation in a judicial proceeding challenging the lawfulness of the agency action"—as has happened here. S. Rep. No. 105-250 at 19–20.

Petitioner's position here—that the Senate has acquiesced in the further erosion of its constitutional prerogatives with respect to the appointment process—is striking in light of the fact that Congress *passed a statute* that clearly expressed its intent to

limit the kinds of nominees who could also serve as acting officers. In *Noel Canning*, this Court took a broad view of the President's power to make recess appointments, largely on the theory that the Senate had not done enough over the preceding two centuries to defend its constitutional role. *See* 134 S. Ct. at 2563 ("[N]either the Senate considered as a body nor its committees, despite opportunities to express opposition to the practice of intra-session recess appointments, has done so."). Given this alleged failure to take "formal action" to "call into question the broad and functional definition of 'recess'" advanced by the Executive Branch in that case, the Court concluded that the Senate had acquiesced in that interpretation because it had done "nothing to deny the validity" of that interpretation. *Id.* at 2564; *see also id.* at 2578 (Scalia, J., concurring in the judgment) (describing the majority opinion as the "adverse-possession theory of executive authority: Presidents have long claimed the powers in question, and the Senate has not disputed those claims with sufficient vigor").

Here, the situation is quite different: Congress has taken "formal action," by enacting the FVRA, with clear intent to reject the interpretation of the Executive Branch. It also set up an enforcement mechanism by inviting private parties to bring suit to remedy the President's circumvention of the FVRA. And yet the Executive Branch stills insists that the Senate has not acted with sufficient vigor to protect the separation of powers and the integrity of the advice-and-consent process. The Court should reject the Executive's continued effort to move the goal posts.

Further, the weight that petitioner places on executive practice in the 18 years since the FVRA was enacted is entirely misplaced. In *Noel Canning*, this Court noted that the frequency of recess appointments "since the beginning of the Republic ... suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances." 134 S. Ct. at 2560. The Court took that "long-standing practice" into account in interpreting the Recess Appointments Clause. *Id.* That is a far different matter from looking to relatively recent practice in order to construe a statutory text. Moreover, as petitioner's appendix suggests, only 112 nominees have served as acting officials in violation of Section 3345(b)(1) in the past 18 years. Pet. Br. App. A. In that time, the Senate has considered nearly 20,000 presidential nominees. Rather than indications of congressional acquiescence in the Executive Branch's misinterpretation of the FVRA, these 112 nominees are no more than "scattered examples" and "anomalies" with no interpretive significance. *Noel Canning*, 134 S. Ct. at 2567

Finally, the fact that Congress has confirmed nominees who served as acting officials in violation of Section 3345(b)(1) is not proof of congressional acquiescence in the Executive Branch's misinterpretation of the FVRA. While declining to confirm a nominee whose acting service stands in violation of Section 3345 is one possible congressional response, the remedy for an FVRA violation is not necessarily a rejected nomination. Rather, it is invalidation of the actions taken by the nominee during the period he or she improperly served as acting officer. *See* 5 U.S.C.

§ 3348(d)(1). *See also* S. Rep. No. 105-250, at 19–20. *Amici*'s colleague, Senator Ron Johnson, recognized this point recently when the Inspector General of the Office of Personnel Management ("OPM") concluded—after the court below issued the decision under review—that the actions of Beth Cobert, acting head of OPM, were "void" under the FVRA since the date she was nominated to serve as the permanent agency head. The Executive Branch's "failure to follow the law when appointing officials to management positions at OPM doesn't change my evaluation of Ms. Cobert's qualifications to be the next director of the agency," said Senator Johnson, who chairs the Senate committee considering Ms. Cobert's nomination. Eric Yoder & Joe Davidson, *OPM director nominee can't serve as acting agency head, inspector general says*, WASH. POST, Feb. 17, 2016, at A7

Senator Johnson's statement accurately reflects the statutory text: the remedy for an FVRA violation is focused on the nominee's prior actions, not on the nominee. Confirmation of an acting official who is serving in violation of the FVRA does not serve to "ratify" that officer's actions. 5 U.S.C. § 3348(d)(2). No more does that confirmation ratify the Executive Branch's circumvention of the vital constitutional safeguards embodied in the Appointments Clause and secured by the FVRA.

CONCLUSION

This Court should affirm the judgment of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST ALLIANCE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICI CURIAE BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS AND THE BUCKEYE INSTITUTE FOR PUBLIC POLICY SOLUTIONS IN SUPPORT OF RESPONDENT

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Cited Authorities

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Corley v. United States,
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5 U.S.C. § 3345(a)(2) 14, 16, 18, 20

5 U.S.C. § 3345(a)(3) .... *passim*

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28 U.S.C. § 511 4

Cited Authorities

Page

28 U.S.C. § 512 4

2A Norman Singer, Statutes and Statutory Construction § 46.06 (6th ed. 2000) 18

3 Sutherland Statutory Construction § 59:8 (7th ed. 2008) 17

American Heritage Dictionary (2d ed. 1982) 17

Best Practices for OLC Legal Advice and Written Opinions, U.S. Dep't of Justice, Office of Legal Counsel (July 16, 2010) . . . . . *passim*

Best Practices for OLC Opinions, U.S. Dep't of Justice, Office of Legal Counsel (May 16, 2005) 5

Garner's Modern English Usage (4th ed. 2016) 17

Larry M. Eigh, Cong. Research Serv., *Statutory Interpretation: General Principles and Recent Trends* (2011) 19

Letter from Carlotta C. Joyner, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R (Feb. 23, 2001) 12-13

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Cited Authorities

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T. Olson, *A Salute to the Federal Circuit*, 217 F.R.D. 548 (2002) 7

Underground Regulations, NFIB Small Business Legal Center (2015).....2

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INTEREST OF *AMICI CURIAE*

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.[1] The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

The Buckeye Institute for Public Policy Solutions ("Buckeye Institute") was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. The staff at the Buckeye Institute accomplishes the organization's

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1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization, as defined by I.R.C. § 501(c)(3). The Buckeye Institute's Legal Center files and joins *amicus* briefs that are consistent with its mission and goals.

Amici file in this case because small businesses have a strong interest in ensuring that courts maintain their Article III power to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). As detailed in a 2015 NFIB Legal Center report, federal agencies frequently issue "guidance" and other informal statements of law, and expect courts to defer to their interpretations. *See Underground Regulations*, NFIB Small Business Legal Center (2015), https://goo.gl/ZctYD8. The small business community suffers from this sub-regulatory conduct because the regulations that agencies promulgate almost always affect small businesses. Providing deference to informal, cursory interpretations of a statute—as Petitioner requests—would further erode small businesses' ability to obtain protection in the federal courts against burdensome regulations.

SUMMARY OF ARGUMENT

Shortly after Congress passed the Federal Vacancies Reform Act of 1998 ("FVRA"), the Office of Legal Counsel ("OLC") issued a memorandum asking and answering 53 questions about the operation of the new law. One of the answers responded to the same question presented here:

do Section 3345(b)(1)'s limitations on being both the acting officer and the nominee apply to all persons who qualify to serve as an acting officer under Section 3345(a)? In three conclusory sentences, OLC answered the question "no." Petitioner now seeks to use this unsupported conclusion to bolster its untenable interpretation of the FVRA.

The Court should reject Petitioner's argument. The OLC opinion is of questionable value because it departs from multiple "best practices" the office uses to ensure sound decisionmaking. Specifically, the opinion provides a general survey of a statute ungrounded in any concrete factual dispute; it does not employ any tools of statutory construction; and it is one-sided, failing even to acknowledge that the law can be fairly construed in a contrary fashion. Indeed, OLC later revised and qualified the opinion for these reasons. On this basis alone, the Court should not defer to this unusual OLC opinion.

Even if OLC had carefully examined the law, however, its interpretation was flawed and is not entitled to deference. Under a plain reading of Section 3345(b)(1) of the FVRA, individuals like Lafe Solomon cannot serve in an acting capacity if they never served in the position of first assistant and were nominated by the President for appointment to such an office. *See* 5 U.S.C. § 3345(b)(1). The FVRA's text, structure, and purpose all refute OLC's initial conclusion.

ARGUMENT

I. The Court Should Not Defer to the OLC Opinion Interpreting Section 3345(b)(1) of the FVRA Because It Offers No Textual Analysis and Departs from Other Best Practices.

A. OLC's Best Practices Demand Legal Opinions That Are Focused, Well-Reasoned, and Persuasive.

OLC is an office in the U.S. Department of Justice that exercises the Attorney General's authority to provide the President and executive agencies with "advice and opinion[s] on questions of law." 28 U.S.C. §§ 511-12. Among other things, OLC is charged with "[p]reparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet." 28 C.F.R. § 0.25(a). In performing these tasks, OLC assists the President in fulfilling his constitutional obligation to preserve, protect, and defend the Constitution, and to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

Although OLC frequently provides informal opinions and legal guidance, the office typically conveys its advice on the most complex and important issues through formal written opinions. These opinions are signed memoranda issued to the Executive Branch official who requested OLC's opinion. Notably, OLC's formal written opinions "inform[] the decisionmaking of Executive Branch officials

on matters of policy" but are not "dispositive as to any policy adopted." *Brennan Ctr. for Justice v. U.S. Dep't of Justice*, 697 F.3d 184, 203 (2d Cir. 2012) (citation omitted).

Because OLC has no statutory authority to make policy decisions or administer any statute, *see id.*, its interpretations are not entitled to *Chevron* deference. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984); *see also Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J. concurring) ("[T]he vast body of administrative interpretation that exists—innumerable advisory opinions not only of the Attorney General, the OLC, and the Office of Government Ethics, but also of the Comptroller General and the general counsels for various agencies—is not an administrative interpretation that is entitled to deference under *Chevron*."). OLC opinions have, at most, the power to persuade. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000). Many of OLC's opinions are persuasive; some are not.

OLC has a memorandum of "best practices" that provides guidance for the office in drafting formal written opinions. *See Best Practices for OLC Legal Advice and Written Opinions*, U.S. Dep't of Justice, Office of Legal Counsel (July 16, 2010), http://goo.gl/g2OIVu ("Best Practices Memo."); *see also Best Practices for OLC Opinions*, U.S. Dep't of Justice, Office of Legal Counsel (May 16, 2005), http://goo.gl/x3X3FV. This memorandum sets forth "longstanding principles that have guided and will continue to guide OLC attorneys in all of their work" and "the best practices OLC attorneys should follow in providing ... formal written opinions." Best Practices Memo. at 1. OLC purports to follow these best

practices. *See, e.g., Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 163 F. Supp. 3d 145, 148 (D.D.C. 2016).

OLC's highest priority is to give advice that is "clear, accurate, thoroughly researched, and soundly reasoned." Best Practices Memo. at 1. To meet this level of rigor, OLC has committed to "provid[ing] advice based on its best understanding of what the law requires—not simply an advocate's defense of the contemplated action or position proposed by an agency or the Administration." *Id.* Thus, OLC must always give "candid, independent, and principled advice—even when that advice is inconsistent with the aims of policymakers." *Id.*

To that end, formal written opinions must "focus intensively on the central issues raised by a request and avoid addressing issues not squarely presented by the question before it." *Id.* at 2. That is, OLC should be "attentive to the particular facts and circumstances at issue in the request, and should avoid issuing advice on abstract questions that lack the concrete grounding that can help focus legal analysis." *Id.* And regardless of OLC's ultimate legal conclusion, the office should "strive to ensure that it candidly and fairly addresses the full range of relevant legal sources and significant arguments on all sides of a question." *Id.*

OLC's principles follow from the federal judiciary's practices for sound decisionmaking. For example, federal courts will not adjudicate legal issues "presented in an abstract rather than in a concrete form." *Gov't & Civil Emps. Org. Comm., CIO v. Windsor*, 353 U.S. 364, 366 (1957). Nor will a federal court resolve a dispute without

considering both sides of the argument. *See, e.g.*, *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2193 (2012). And a federal court will not opine on the meaning of a statute without "employing traditional tools of statutory construction." *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2220 (2014).

At bottom, "the value of OLC advice depends upon the strength of its analysis." Best Practices Memo. at 1. OLC, like all federal agencies, should follow its internal protocols and "show its work" when interpreting any statute. When OLC follows these best practices, it upholds its "reputation for clear, honest, scholarly advice that is accorded considerable respect and credibility across the political spectrum." T. Olson, *A Salute to the Federal Circuit*, 217 F.R.D. 548, 620 (2002). When it does not, its statutory interpretations should receive little, if any, respect from the federal courts.

B. The 1999 OLC Opinion upon Which Petitioner Relies Does Not Conform to the Office's Best Practices.

On October 21, 1998, the FVRA was signed into law. *See* Pub. L. No. 105-277, 112 Stat. 2681. The FVRA imposed new limits on a President's authority to fill vacancies in presidentially appointed, Senate-confirmed offices within the Executive Branch ("PAS positions"). The FVRA was "framed as a reclamation of the Congress's Appointments Clause power," *SW Gen., Inc. v. N.L.R.B.*, 796 F.3d 67, 70 (D.C. Cir. 2015), which requires "Officers of the United States" to be nominated by the President "by and with the Advice and Consent of the Senate," U.S. Const. art. II, § 2. Before the FVRA, Presidents of both parties had

undermined the Senate's confirmation power by allowing numerous PAS officers to "serv[e] in a temporary acting capacity, many well beyond the time limits prescribed" under prior law. *SW Gen.*, 796 F.3d at 70.

Five months after the FVRA's enactment, OLC issued a memorandum opinion to all Agency General Counsels entitled "Guidance on Application of Federal Vacancies Reform Act of 1998." 23 Op. O.L.C. 60 (1999) ("1999 OLC Opinion"). The opinion provided "general guidance" on "the application of the [FVRA] to vacancies in Senate-confirmed offices within the Executive Branch." *Id.* at 60. As a means of providing this guidance, the opinion asked and answered 53 questions involving a range of issues concerning the FVRA. Most of these answers were given in a few sentences and none was longer than two paragraphs. *See id.* 60-73.

As relevant here, the opinion contained the following question and answer:

> **Question 15.** Does [the] limitation on the ability to be both the nominee and the acting officer apply only to first assistants, or does it also apply to persons who qualify to serve as an acting officer under other provisions of the Vacancies Reform Act?
>
> **Answer.** The limitation on the ability to be the nominee for the vacant position and to serve as the acting officer applies only to persons who serve as acting officers by virtue of having been the first assistant to the office. If someone is serving in an acting capacity on

> another basis, i.e., as a PAS or a senior agency employee designated by the President, this particular limitation does not apply. However, because senior agency employees may not be designated by the President unless they have served in the agency for ninety days within the year preceding the vacancy, *see* Q20, a similar time limitation in fact applies to anyone who is not already in a PAS position.

Id. at 64.

Petitioner contends that this opinion, which has been followed by subsequent administrations, supports its interpretation of 5 U.S.C. § 3345(b)(1). *See* Pet. Br. 24 ("The consistent manner in which the FVRA has been interpreted and applied since its enactment reinforces the plain text."); *see also id.* at 14, 15, 25, 50. 51. Petitioner's reliance on this OLC opinion is misplaced. Besides being legally incorrect, *see infra* 14-20, the 1999 OLC Opinion departed in several ways from OLC's best practices, rendering it unworthy of this Court's solicitude.

As an initial matter, the opinion's Q&A format appears to be unprecedented. *Amici* are unaware of any other OLC opinion that provides a general survey of a statute through dozens of hypothetical questions and answers. *See generally Opinions of the Office of Legal Counsel*, U.S. Dep't of Justice, http://goo.gl/bdc88K (providing 32 years of published OLC opinions). Indeed, *amici* are aware of only two opinions that are even remotely similar, and even these are far more focused and less abstract than the 1999 OLC Opinion. *See* Temporary Filling of Vacancies in the Office of United States Attorney, 27 Op.

O.L.C. 149 (2003); Memorandum Opinion for the Counsel to the President: Travel Expenses—Person Traveling on Behalf of the President—Use of Appropriate Funds, 2 Op. O.L.C. 327 (1977).

The novelty of the Q&A approach is not surprising: the format departs from numerous OLC best practices. As explained above, OLC opinions "should avoid issuing advice on abstract questions that lack the concrete grounding that can help focus legal analysis." Best Practices Memo. at 2; *see id.* at 3 ("The legal question presented should be focused and concrete; OLC generally avoids providing a general survey of an area of law or issuing broad, abstract legal opinions."). Yet that is just what the 1999 OLC Opinion does. It presents 53 questions—untethered to any actual cases or controversies that have arisen within an agency—and then answers them with minimal analysis. It thus is no surprise the opinion misreads the statute. *See infra* 14-20; *cf. Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (explaining that legal questions should be resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action").

Moreover, on "questions of interpretation," "OLC's analysis should be guided by the texts of the relevant documents, and should use traditional tools of construction in interpreting those texts." Best Practices Memo. at 2. But Question 15 in the 1999 OLC Opinion is answered with a mere three sentences. It contains *no* textual analysis, relies on *no* canons of statutory construction, and points to *no* congressional purpose or legislative history as

guiding or even reinforcing its conclusion. Compared to Petitioner's brief, which addresses the same issue in no fewer than 30 pages, *see* Pet. Br. 25-55, the 1999 OLC Opinion falls far short.

An OLC opinion also "should strive to ensure that it candidly and fairly addresses the full range of relevant legal sources and significant arguments on all sides of a question." Best Practices Memo. at 2. Not only does the OLC opinion ignore the alternative view—which the D.C. Circuit and Ninth Circuit both have accepted, *see SW Gen.*, 796 F.3d at 76; *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 558 (9th Cir. 2016)—but there is no indication that the opinion had even contemplated an alternative interpretation of Section 3345(b)(1). This tunnel vision likewise undermines Petitioner's argument that the opinion reflects the office's considered, well-reasoned views on the operation of the FVRA.

Most importantly, OLC has since overruled parts of the 1999 OLC Opinion and cautioned against relying on its conclusions. In 2001, the President asked OLC whether Phil Perry, the Principal Deputy Associate Attorney General, could serve as the Acting Associate Attorney General, despite the fact that Mr. Perry became the Principal Deputy Associate Attorney General *after* the vacancy occurred. *See* Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177 (2001) ("2001 OLC Opinion"). OLC recognized that it had answered the underlying legal question "no" in the 1999 OLC Opinion, where it concluded that "you must be the first assistant when the vacancy occurs in order to be the acting officer." *See id.* at 179 (quoting Question 13 of the 1999 OLC Opinion).

But in analyzing the question as it applied to Mr. Perry, OLC gave little weight to its previous analysis. As the "brevity of [the] answer ma[de] clear," OLC observed, the office "did not thoroughly consider (or definitively resolve) the issue" and had only "tentatively answered" the question. *Id.* Indeed, OLC's "initial understanding was offered without explanation or, more importantly, any analysis of the Act's text or structure." *Id.* When the President's request for advice regarding Mr. Perry gave OLC occasion to fully consider the statutory question "in light of both the Act's text and structure," OLC acknowledged that its "initial understanding was erroneous" and concluded that the "better understanding" of the FVRA was that "an individual need not be the first assistant when the vacancy occurs in order to be the acting officer." *Id.* at 179, 181.

Put simply, even OLC no longer accepts the 1999 opinion as definitively and correctly resolving the questions it attempted to answer. When these questions arise in an actual controversy, OLC does not consider the matter resolved. Instead, the office carefully employs the traditional tools of statutory construction to determine what the statute requires, as is necessary for rational and grounded analysis of any statutory regime. *See id.*; *compare* 1999 OLC Opinion at 65 (Question 20), *with* Designation of Acting Director of the Office of Management and Budget, 27 Op. O.L.C. 121, 121, 124-25 (2003) (examining a similar question in a concrete situation involving the acting director of the OMB).[2] The Court

2. Petitioner also relies on the legal opinion of the Government Accountability Office ("GAO"). *See* Letter from Carlotta C. Joyner, *Eligibility Criteria for Individuals to Temporarily Fill Vacant*

should not defer to the 1999 OLC Opinion, to which OLC itself no longer accords deference.

Finally, *amici* do not mean to denigrate the OLC officials who drafted the 1999 OLC Opinion. OLC frequently "operates under severe time constraints in providing advice" and is often tasked with analyzing difficult questions of law that are "centrally important to the functioning of the Federal Government." Best Practices Memo. at 1-2. Given the wide-ranging effects of the FVRA, OLC may have had sound reasons for adopting the Q&A approach in that particular situation.

The fact nevertheless remains that the 1999 OLC Opinion is not the type of "thoroughly researched and soundly reasoned" opinion to which this Court might defer. Best Practices Memo. at 1. These brief answers, including Question 15, were "tentative" and "not thoroughly considered." 25 Op. O.L.C. at 179. If "[t]he value of OLC advice depends upon the strength of its analysis," Best Practices Memo. at 1, then the 1999 OLC Opinion adds little, if any, value to the present dispute.

Positions Under the Federal Vacancies Reform Act of 1998, GAO-01-468R, at 3-4 (Feb. 23, 2001), https://goo.gl/RjvLIG. But the GAO opinion similarly offers an interpretation of the FVRA that fails to grapple with the statutory text. Such shallow reasoning warrants no deference from this Court. *See supra* 5-7; *see also Bowsher v. Merck & Co.*, 460 U.S. 824, 837 (1983) (providing no deference to GAO's "longstanding interpretation" of the access-to-records statutes).

II. The 1999 OLC Opinion Misinterprets Section 3345(b)(1) of the FVRA.

This case requires the Court to answer the same basic question that OLC quickly addressed in the 1999 OLC Opinion: namely, whether Section 3345(b)(1)'s prohibitions on serving as both the nominee and the acting officer apply to all persons who qualify to serve as an acting officer under Section 3345(a). As Respondent has thoroughly explained, the answer is "yes." Resp. Br. 22-61.

Section 3345(a) of the FVRA creates three categories of individuals who may serve in a vacant PAS position. *See* 5 U.S.C. § 3345(a)(1)-(3). Subsection (a)(1) fills the vacancy automatically. It says that "the first assistant to the office of such [absent] officer *shall perform* the functions and duties of the office," unless someone else is appointed. *Id.* § 3345(a)(1) (emphasis added). Subsections (a)(2) and (a)(3) allow the President to select other individuals to fill the vacancy. *Id.* § 3345(a)(2)-(3). Subsection (a)(2) permits the President to designate prior Senate-confirmed officers to the vacancy, and Subsection (a)(3) permits the President to designate officers who have served within the agency for not less than 90 days in a position with a GS-15 salary to fill the vacancy.

Subsection (b)(1), in turn, carves out certain individuals who *cannot* fill the PAS vacancy. It states:

> (b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

> (A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—
>
> > (i) did not serve in the position of first assistant to the office of such officer; or
> >
> > (ii) served in the position of first assistant to the office of such officer for less than 90 days; and
>
> (B) the President submits a nomination of such person to the Senate for appointment to such office.

5 U.S.C. § 3345(b)(1).

Subsection (b)(1) thus prevents certain individuals from serving in an acting capacity after being nominated to the permanent position unless the person had been the first assistant for at least 90 days. Petitioner contends—and OLC in 1999 agreed—that Subsection (b)(1) applies *only* to acting officers designated under Subsection (a)(1). *See* Pet. Br. 26; 1999 OLC Opinion at 64. Petitioner and OLC's prior opinion are wrong.

The "preeminent canon of statutory interpretation requires [the Court] to presume that [the] legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). Under a plain reading of Section 3345(b)(1), no individual may continue serving as an acting

officer after being nominated for the permanent position if he or she has never served as the first assistant of the office. Here, there is agreement that (1) Mr. Solomon never served in the position of first assistant to the office of the NLRB General Counsel and (2) President Obama nominated him to be General Counsel on January 5, 2011. Pet. Br. 17-18. As of January 5, 2011, then, Mr. Solomon could no longer serve as acting NLRB General Counsel.

Nothing in Subsection (b)(1) limits its effect only to those individuals serving under Subsection (a)(1). On the contrary, Subsection (b)(1) states that "[n]otwithstanding subsection (a)(1), a *person* may not serve as an acting officer for an office under *this section*" in certain circumstances. Congress's use of "a person" shows that the provision covers *all* persons who could serve as an acting officer—under Subsections (a)(1), (a)(2), and (a)(3)—and not just "first assistants." Similarly, by using the phrase "this section," Congress made clear that certain individuals cannot serve under *any* provision of Section 3345—not just Subsection (a)(1).

Petitioner disagrees with this straightforward interpretation of the statute. Petitioner's principal argument is that Subsection (b)(1) does not apply here because it is preceded by the dependent clause "[n]otwithstanding subsection (a)(1)." *See* Pet. Br. 27-28. And Subsection (a)(1) provides that, if a PAS vacancy occurs, then "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(1). Thus, in Petitioner's view, Congress inserted this clause to make clear that "the limits of Subsection (b)(1) take precedence over only one of three statutory mechanisms

for acting service—the mechanism for service by a first assistant under Subsection (a)(1)." Pet. Br. 21. Because Mr. Solomon became acting NLRB General Counsel under the method articulated in Subsection (a)(3), *see* 5 U.S.C. § 3345(a)(3), Petitioner contends that naming him acting General Counsel did not violate Subsection (b)(1).

Petitioner's argument fails for multiple reasons. First, Petitioner's argument turns on a misreading of the word "notwithstanding." Congress does not use the word "notwithstanding" to mean, as Petitioner needs it to, "for the purpose of" or "with respect to." *See* Pet. Br. 21-22. "Notwithstanding" means "in spite of," American Heritage Dictionary (2d ed. 1982), or "without prevention or destruction from or by," Webster's Third World International Dictionary (3d ed. 2002); Garner's Modern English Usage (4th ed. 2016) (defining "notwithstanding" as "a formal word used in the sense 'despite,' 'in spite of,' or 'although'"); *see also* Resp. Br. 31-32.

A "notwithstanding" clause thus "does not define the scope of [the statute]." *Kucana v. Holder*, 558 U.S. 233, 238-39 n.1 (2010). It simply "informs that once the scope of the [statute] is determined, [it applies] regardless of what any *other* provision or source of law might say." *Id.*; *see also* 3 Sutherland Statutory Construction § 59:8 (7th ed. 2008) ("In general, a 'notwithstanding' clause merely excepts enumerated provisions that otherwise conflict."). By using "notwithstanding subsection (a)(1)," Congress merely made clear that Subsection (b)(1)'s prohibitions control, "in spite of" Subsection (a)(1)'s command that first assistants "shall" serve as the acting officer.

If Congress had wanted to limit Subsection (b)(1) solely to those officers appointed under Subsection (a)(1), it knew how to do so. It would have said "*for purposes of* subsection (a)(1), a person may not serve as an acting officer ...." Indeed, Congress used the phrase "for purposes of" in the very next subsection of the FVRA. *See* 5 U.S.C. § 3345(c)(2) ("For purposes of this section ... the expiration of a term of office is an inability to perform the functions and duties of such office."). These two clauses—both of which appear within the same section of the statute—must be given different meanings. *See Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338, (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another."); *see* 2A Norman Singer, Statutes and Statutory Construction § 46.06 (6th ed. 2000) (same).

Second, Petitioner misreads the significance of Subsection (b)(1)'s reference to Subsection (a)(1). Contrary to Petitioner's speculation, *see* Pet. Br. 32-33, singling out Subsection (a)(1) makes sense. Congress uses "notwithstanding" clauses, as it did here, to signal its "intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). Under the FVRA, only Subsection (a)(1) commands a replacement for the PAS vacancy (the first assistant); Subsections (a)(2) and (a)(3), by contrast, provide mechanisms for the President to appoint someone other than the first assistant. Subsection (b)(1)'s "notwithstanding" clause thus means that, although Subsection (a)(1) is the default rule for filling a PAS vacancy, Subsection (b)(1)'s limitations still apply. "Without the 'notwithstanding' clause, confusion could easily arise as to whether (b)(1) has any force in light of the fact that a default rule exists." *Hooks*, 816 F.3d at 560.

To be sure, Congress could have spoken more broadly, as Petitioner suggests, by saying "notwithstanding any other law." *See* Pet. Br. 30-31. But the "preclusive scope" of a clause "purport[ing] to override 'any other provision of law,' ... often is unclear." Larry M. Eigh, Cong. Research Serv., *Statutory Interpretation: General Principles and Recent Trends* 37 (2011); *see, e.g.*, *Or. Nat. Res. Council v. Thomas*, 92 F.3d 792, 796 (9th Cir. 1996) (holding that a directive to proceed with timber sale contracts "notwithstanding any other provision of law" meant only "notwithstanding any provision of *environmental* law"). By focusing narrowly on Subsection (a)(1), Congress might simply have concluded that it would "be more effective to spell out which other laws are to be disregarded," Eigh, *supra*, 37, rather than broadly preclude other laws or provisions. Indeed, this type of broad "notwithstanding" clause likely would not have worked here because it would have risked overriding 40 independent vacancy-filling mechanisms in other statutes. *See Hooks*, 816 F.3d at 556; S. Rep. No. 105-250 at 17; *see also* 5 U.S.C. § 3347(a).

Third, Petitioner's interpretation would render Section 3345(b)(2)(A) meaningless. That provision states that Subsection (b)(1) will not apply if, among other things, the person "is serving as the first assistant to the office of an officer described under subsection (a)." 5 U.S.C. § 3345(b)(2)(A). But this provision is superfluous if Subsection (b)(1) applies only to Subsection (a)(1). A person can fill a PAS vacancy under Subsection (a)(1) *only* if he or she is serving as the "first assistant." Congress had no need to insert Subsection (b)(2)(A) under Petitioner's interpretation because an individual could *never* be an acting officer under Subsection (a)(1) without being a first assistant. If, however, Subsection (b)(1) applies to all

acting officers—including those designated under (a)(2) and (a)(3)—then Subsection (b)(2)(A) is not superfluous because many such officers will not be serving as the first assistant. *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."); *see also* Resp. Br. 29-32 (identifying additional superfluities created by Petitioner's interpretation).

Given this unambiguous language, it is telling that Petitioner places so much emphasis on OLC's and GAO's interpretations of the FVRA.[3] Pet. Br. 48-55. As an initial matter, these agencies are not charged with administering the FVRA and so no deference is warranted for their interpretations. *See supra* 5; *Hooks*, 816 F.3d at 564. In any event, the short-lived, conclusory OLC and GAO opinions are not the type of well-reasoned agency pronouncements that should influence this Court's decisionmaking. Indeed, not only are these agency opinions poorly reasoned, they are also wrong. *See supra* 14-19. That these incorrect opinions are "longstanding" also is of no moment—the law says what it says. *See Brown v. Gardner*, 513 U.S. 115, 122 (1994). This Court should not accord them deference.

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3. Petitioner also relies on the statute's legislative history and supposed "purposes" to overcome the plain reading of the statute. The Court of Appeals correctly rejected these arguments, *see SW Gen.*, 796 F.3d at 77-78; *see also Hooks*, 816 F.3d at 562-64, as does Respondent, *see* Resp. Br. 46-54. These concerns have no consequence where, as here, the statute's meaning is plain. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").

CONCLUSION

Amici curiae respectfully request that the Court affirm the judgment below.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* MORTON ROSENBERG IN SUPPORT OF RESPONDENT

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Cases (Continued) **Page(s)**

Olympic Fed. Savings & Loan Ass'n v. *Director*, 732 F. Supp. 1183 (D.D.C.), *appeal dismissed as moot*, 903 F.2d 837 (D.C. Cir. 1990) 35

SW Gen., Inc. v. *NLRB*, 796 F.3d 67 (D.C. Cir. 2015) 7

Statutes **Page(s)**

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Act of Feb. 13, 1795, 1 Stat. 415 35

Act of Feb. 20, 1863, 12 Stat. 656 35

Act of July 23, 1868, 15 Stat. 168 35

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Other Authorities **Page(s)**

141 Cong. Rec.:

(Dec. 22, 1995)
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Other Authorities (Continued) **Page(s)**

144 Cong. Rec.:

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MICHAEL GERHARDT, THE FEDERAL APPOINTMENT PROCESS (2000)..... 11, 12, 13

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Letter from Carlotta C. Joyner to Sen. Fred Thompson, Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998, GAO-01-468R (Feb. 23, 2001) 33

Burdett Loomis, *The Senate: An "Obstacle Course" for Executive Appointments?*, *in* INNOCENT UNTIL NOMINATED: THE BREAKDOWN OF THE PRESIDENTIAL APPOINTMENTS PROCESS (2001 G. Calvin Mackenzie, ed.)..... 12

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Other Authorities (Continued) **Page(s)**

G. CALVIN MACKENZIE, THE POLITICS OF PRESIDENTIAL APPOINTMENTS (1981) 10, 11

Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913 (2009) 10, 13

Office of Legal Counsel, *Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60 (Mar. 22, 1999) 32

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Morton Rosenberg, Congressional Research Service, *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* (Jan. 14, 1998), incorporated at S. Hrg. 105-495 (Mar. 18, 1998) 15, 16, 32, 35

Other Authorities (Continued) **Page(s)**

Elizabeth Rybicki, Congressional Research Service, *Senate Confirmation of Presidential Nominations: Committee and Floor Procedure* (Mar. 9, 2015) 12

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Morton Rosenberg served as an analyst in the American Law Division of the Congressional Research Service for 35 years, from 1973 until 2008. Among numerous other topics, Mr. Rosenberg often wrote research publications and testified before Congress regarding Executive appointments and related issues. In particular, Mr. Rosenberg testified before the Senate Governmental Affairs Committee during the debate of the Federal Vacancies Reform Act ("FVRA"), and a publication written by Mr. Rosenberg was incorporated into the Committee record. Mr. Rosenberg is considered a leading authority on the FVRA and its legislative history.

In its Opening Brief, Petitioner National Labor Relations Board ("Board") cited Mr. Rosenberg's publications numerous times to support its arguments regarding the FVRA's legislative history and congressional purpose. *See* NRLB Br., at 6, 7, 8, 51. Mr. Rosenberg believes that the Board has not drawn the proper conclusions from his research, and that the Board's position in this case conflicts with the background and purposes of the FVRA and threatens

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represent that, in consultation with *amicus*, they authored this brief in its entirety and that none of the parties or their counsel, nor any person or entity other than *amicus* or his counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* also represent that all parties have consented to the filing of this brief. Counsel for both Petitioner and Respondent have provided counsel for *amicus* with their written consent to the filing of this brief.

the critical separation-of-powers interests that Congress enacted the statute to preserve.

SUMMARY OF THE ARGUMENT

I. The Court of Appeals correctly concluded that the limitation imposed by 5 U.S.C. § 3345(b)(1) applies to all acting officials serving under § 3345(a), not merely to first assistants serving in an acting capacity under § 3345(a)(1). First, both Senate practice and the legislative history of the Federal Vacancies Reform Act ("FVRA") show that Congress did not intend to impose less stringent restrictions on acting officials designated under § 3345(a)(2)—that is, PAS officials who have already received Senate confirmation to a different PAS office—than the restrictions applicable to first assistants serving under § 3345(a)(1).

A. The Board contends that Congress had little reason to apply § 3345(b)(1) to acting officials whom the Senate has already confirmed for another PAS position. In the Board's view, the prior confirmation suggests that the Senate has already concluded that the individual is fit to hold a PAS office, reducing concerns that the President may designate that individual as an acting official in order to evade the Senate's advice-and-consent role. But Senate confirmation decisions reflect a particularized judgment that a nominee should serve in the specific PAS office for which she has been nominated. The Senate does not view its confirmation decisions as a broad judgment that a nominee is appropriate for *all* PAS offices, in the abstract. Thus, the fact that the Senate has confirmed an individual

for one PAS office does not imply that the Senate is necessarily more comfortable with that individual serving in an acting capacity while awaiting re-confirmation than it would be with a former first assistant.

B. At the time of the FVRA's enactment, the Senate was deeply concerned with attempts by the Executive to move Senate-confirmed PAS officials between PAS positions without seeking Senate re-confirmation. These issues were discussed extensively in the Senate Committee Hearings on the FVRA. And several of the most frequently cited examples of Executive conduct necessitating the enactment of the FVRA involved officials who had received Senate confirmation for one PAS office and then had assumed another PAS office on an acting basis. Thus, the FVRA's legislative history strongly supports the conclusion that Congress intended for § 3345(b)(1)'s limitation to apply to acting officials designated under § 3345(a)(2).

II. Second, the Board claims that applying § 3345(b)(1)'s limitation to acting officials designated under § 3345(a)(3) would undermine the broad congressional purpose of encouraging and facilitating the nomination of career civil servants to PAS positions. In particular, the Board contends that the interpretation adopted by the Court of Appeals would hinder this broad congressional purpose, because it would prevent career civil servants from simultaneously serving as both an acting official under § 3345(a)(3) and as the nominee for the same PAS office on a permanent basis. The legislative history of the FVRA indicates both that the Board overstates the degree to which the application of

§ 3345(b)(1) would hinder the purported congressional purposes, and also that the Board overstates the breadth of the congressional purposes underlying § 3345(a)(3).

A. The legislative history of the FVRA indicates that Congress expressly contemplated that the statute might force the President to choose between designating a qualified candidate to serve on an acting basis under § 3345(a), or nominating that person for the position on a permanent basis. Rather than viewing this choice as a severe constraint on the President's ability to nominate qualified officials, the Senate Committee concluded that this effect would not disturb the President's nominating powers "in any way." S. Rep. 105-250 (1998), at 13. Thus, far from yielding consequences that undermine Congress's intent, the interpretation adopted by the Court of Appeals present the President with precisely the choice that Congress contemplated—and approved.

B. The legislative history of the FVRA suggests that the congressional purposes underlying § 3345(a)(3) are narrower and more modest than the Board argues. Congress did not view § 3345(a)(3) as a broad means of facilitating and encouraging the nomination of career civil servants to PAS positions. Instead, Congress primarily viewed § 3345(a)(3) as addressing situations (particularly at the beginning of a new presidential Administration) where there was no first assistant to the vacant office, and designating a PAS official who had already received Senate confirmation for another PAS office would be impractical, either because no such official is available or because designating such an official

would itself create a new vacancy. Moreover, as even some of § 3345(a)(3)'s strongest proponents emphasized, service under that Subsection was intended to be *temporary*. Applying § 3345(b)(1)'s limitation would not hinder this limited congressional purpose.

III. The Board claims that its interpretation of § 3345(b)(1) derives support from the fact that Congress allegedly has not strongly opposed past Executive action that violates the FVRA under the interpretation adopted by the Court of Appeals. The Board further argues that its interpretation finds support in formal opinions issued by the Office of Legal Counsel ("OLC") and the General Accounting Office ("GAO"). Neither of these contentions supports the Board's position in this case.

A. The alleged lack of strong congressional opposition to the Executive's past violations of the FVRA does not excuse those violations, nor does it signal that Congress approves the Executive's interpretation of the statute. Congress enacted the FVRA to preserve the critical separation of powers under the Appointments Clause. Congressional inaction cannot excuse violations of these sorts of structural limitations, which exist to protect broad liberty interests of the People, not merely the prerogatives of the Senate. In addition, congressional inaction on violations of the FVRA likely reflects the fact that Congress faces numerous other pressing concerns, not that Congress approves of Executive conduct that conflicts with the plain language of the FVRA.

B. The OLC and GAO opinions cited by the Board do not warrant deviating from the plain

language of the statute. The Court does not defer to these sorts of formal opinions, and—as with a legal brief or scholarly publication—it accords them weight only to the extent that they are persuasive. Here, the OLC opinion on which the Board principally relies does not provide any careful analysis of the statutory text, instead presenting only a cursory and conclusory statement that is not persuasive. The GAO opinion cited by the Board provides even less support. Indeed, it is unclear that the GAO opinion addresses the Board's interpretation at all. Thus, these opinions provide no basis for deviating from the plain language of the statute. Moreover, the FVRA represents, in large part, Congress's rejection of a series of OLC opinions adopting aggressive interpretations of the Vacancies Act (the FVRA's predecessor) that undermined the Senate's advice-and-consent role. Against this statutory background, relying on the conclusory analysis offered by OLC here would be especially anomalous.

IV. Fourth, the Board contends that Congress has afforded the President "substantial latitude" regarding acting officials since the beginning of the Nation. To the contrary, for more than two centuries, Congress has strictly limited the President's designation of acting PAS officials in order to preserve the Senate's advice-and-consent role.

ARGUMENT

The Federal Vacancies Reform Act ("FVRA") permits the President to select from three classes of persons to temporarily fill, on an acting basis,

positions that require the advice and consent of the Senate under the Appointments Clause. 5 U.S.C. § 3345(a). The President may choose to allow the current first assistant to the vacant office serve as the acting official (under § 3345(a)(1)), or the President may choose to fill the office on a temporary, acting basis with a current PAS official who has already received Senate confirmation for a different PAS position (under § 3345(a)(2)) or a longstanding civil servant already working within the agency in which the vacancy arose (under § 3345(a)(3)). *Id.* If the President wishes to nominate an acting official to serve as the permanent holder of that office, the FVRA imposes an additional limitation: "Notwithstanding subsection (a)(1)," a person may not serve simultaneously as an acting officer under the FVRA and the nominee for the same PAS office on a permanent basis, unless the nominee has served as first assistant for at least 90 days in the year prior to the vacancy. 5 U.S.C. § 3345(b)(1)(A)-(B).

This case turns on the narrow interpretive question whether the limitation imposed by § 3345(b)(1) ("Subsection (b)(1)") applies to acting officials designated under § 3345(a)(2) ("Subsection (a)(2)") and § 3345(a)(3) ("Subsection (a)(3)"), or only to those acting officials serving under § 3345(a)(1). As the Court of Appeals explained, the statutory text clearly provides that Subsection (b)(1)'s limitation applies to *all* acting officials serving pursuant to § 3345(a). *SW Gen., Inc.* v. *NLRB*, 796 F.3d 67, 72-78 (D.C. Cir. 2015). Faced with the textual weakness of its position, the Board relies heavily on its claim that the interpretation adopted by the Court of Appeals

conflicts with the legislative history and the congressional purposes underlying the FVRA.

Contrary to the Board's assertions, the FVRA's legislative history and the congressional purposes underlying the statute actually *support* the interpretation adopted by the Court of Appeals. Careful consideration of these sources confirms the plain meaning of the statute and supports affirming the judgment of the Court of Appeals.

I. Senate Practice and the Legislative History of the FVRA Make It Entirely Reasonable for Congress to Have Applied the Same Limitations on Acting PAS Officials Designated under Subsection (a)(2) as It Applied to First Assistants Serving under Subsection (a)(1).

The Board contends that it is "implausible" that Congress intended Subsection (b)(1)'s limitation to apply to designees under Subsection (a)(2). NLRB Br., at 39. According to the Board, "[a] Senate-confirmed official, even at another agency, has been found by the Senate to be qualified to serve in a high-ranking government position." *Id.* at 43 n.5. And because an acting official designated "under Subsection (a)(2) already serves in a PAS position, that official is unlikely to have been directed to do so in an attempt to circumvent the Senate's advice-and-consent role." *Id.* at 42. This theory misunderstands both the Senate's view of its confirmation decisions and the legislative history of the FVRA.

A. Senate confirmation decisions reflect a judgment that an individual may serve in a particular PAS office, not a broad judgment that the individual is fit to serve in PAS offices generally.

Contrary to the Board's assertions, the Senate views its confirmation decisions as position-specific determinations that a nominee can serve in a particular PAS office, not a general judgment that the nominee is qualified for *any* "high-ranking government position." NLRB Br., at 43 n.5. The Senate does not view PAS offices and PAS officials as "fungible." "The Senate's advice and consent prerogative is particular, not general; its scrutiny is narrow and focused rather than broad and encompassing." Morton Rosenberg, Congressional Research Service, *Requirement of Reconfirmation by the Senate When the Executive Seeks to Shift an Officer from One Advice and Consent Position to Another*, at 20 (Oct. 11, 1995) ("*Requirement of Reconfirmation*"). When the Senate considers whether to confirm a nominee, it addresses only whether the nominee would be appropriate for the specific office to which she has been nominated. *See id.* A number of important practical and institutional interests underlie this particularized approach to confirmations.

First, the requisite qualifications and experience vary significantly between PAS positions. "Nominees . . . are expected to have acquired the appropriate training, insight, and sensitivity for service in a specific government office." G. CALVIN MACKENZIE, THE POLITICS OF PRESIDENTIAL

APPOINTMENTS 97 (1981). The background and experience that an official needs to succeed differs significantly between PAS positions. While a nominee's background may make her highly qualified to serve in a position within the Department of Energy, for example, her background might not make the same nominee qualified to head the Office of Legal Counsel. Moreover, "[s]ome positions, such as the Director of the National Institutes of Health or the Director of National Intelligence, may require more qualified officials than other jobs." Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 947 (2009) ("*Vacant Offices*"). Thus, the Senate's confirmation of a PAS official reflects a particularized judgment that the nominee was qualified for the specific position to which she was nominated.

Second, when determining whether to confirm a nominee, the Senate often closely scrutinizes whether the nominee has any "predispositional conflicts" that might hinder her service in the position. MACKENZIE, THE POLITICS OF PRESIDENTIAL APPOINTMENTS, *supra* at 98-109; ARTHUR MAASS, CONGRESS AND THE COMMON GOOD 183-85 (1983). Predispositional conflicts include aspects of a nominee's background that might limit—or be perceived to limit—the nominee's ability to discharge her duties fairly and effectively. *See id.* These predispositional conflicts often vary significantly between PAS offices, because many PAS offices relate to markedly different substantive areas of law and face markedly different incentives. For example, if the President were to nominate a long-time coal executive as EPA Administrator, some Senators

might question whether the nominee's background in the coal industry could make the nominee less open—whether consciously or unconsciously—to regulating greenhouse-gas emissions. But the nominee's background might not suggest any predispositional conflicts if she were nominated as a Deputy Secretary of Education. The Senate's judgment that a nominee does not have any disqualifying predispositional conflicts typically relates only to the specific office for which the nominee was confirmed.

Third, the Senate often uses confirmation hearings to extract policy commitments from nominees. Senate "committees require nominees, as a condition of confirmation, to make policy-related promises during confirmation hearings." MAASS, CONGRESS AND THE COMMON GOOD, *supra* at 185; *see also* MACKENZIE, THE POLITICS OF PRESIDENTIAL APPOINTMENTS, *supra* at 134 (noting that committees "may require the nominee, as a condition of his confirmation, to make policy-related promises to the committee during his confirmation hearing"); ROBERT A. KATZMANN, JUDGING STATUTES 24 (2014) (noting that Senators often use confirmation hearings "to press nominees to commit to interpreting statutes in particular ways as a condition for affirmative votes"); MICHAEL GERHARDT, THE FEDERAL APPOINTMENT PROCESS 175 (2000) ("The confirmation process has provided excellent opportunities for senators . to extract promises (in public hearings or private meetings) from nominees to nonjudicial offices in exchange for their confirmation."). This practice can enable "Senators [to] influence policy through the confirmation process." Elizabeth Rybicki, Congressional Research Service, *Senate*

Confirmation of Presidential Nominations: Committee and Floor Procedure 1 (Mar. 9, 2015); *see also* GERHARDT, THE FEDERAL APPOINTMENT PROCESS, *supra* at 175. These policy-related commitments differ significantly between PAS offices, both because various PAS offices address markedly different substantive areas of policy and because various PAS offices have differing degrees of policy-making authority. Thus, the Senate's confirmation of a nominee reflects a judgment specific to the office for which the nominee was confirmed.

Fourth, the Senate scrutinizes nominations to some PAS offices far more closely than nominations to other offices. Commentators have noted "the tendency of senators to question or oppose nominations depending on the importance of the offices to which they are made." GERHARDT, THE FEDERAL APPOINTMENT PROCESS, *supra* at 171-72. "Among the executive branch positions, nominees for policymaking positions are more likely to be examined closely than nominees for non-policy positions." Rybicki, *Senate Confirmation of Presidential Nominations*, *supra* at 1. Thus, the Senate's confirmation of a person to a non-policy-making PAS position does not necessarily reflect a judgment that the person should hold a policy-making position. Similarly, the substantive areas of law within the purview of a PAS office often affect the level of scrutiny faced by a nominee. *See* Burdett Loomis, *The Senate: An "Obstacle Course" for Executive Appointments?*, *in* INNOCENT UNTIL NOMINATED: THE BREAKDOWN OF THE PRESIDENTIAL APPOINTMENTS PROCESS 167 (2001 G. Calvin Mackenzie, ed.) (noting that nominations to certain

departments may receive greater scrutiny from the Senate than nominations to other departments). "Some positions . . . deal with more controversial issues than others . " O'Connell, *Vacant Offices*, 82 S. Cal. L. Rev. at 969. For example, nominations to positions relating to civil-rights matters often attract considerably more scrutiny than most other positions. *See* GERHARDT, THE FEDERAL APPOINTMENT PROCESS, *supra*, at 170-72. The Senate might devote limited attention to a nomination to the office of General Counsel for the Department of Commerce, but it would devote significant more attention if the same person were nominated to serve as a Commissioner of the Equal Employment Opportunity Commission.

For the reasons described, the Senate's confirmation decisions reflect a particularized judgment that a nominee is appropriate for the specific PAS office for which she has been confirmed. *See* Rosenberg, *Requirement of Reconfirmation*, *supra* at 20. Contrary to the Board's assertion, the Senate does not view its confirmations as a broad, decontextualized judgment that a person is "qualified to serve in a high-ranking government position." NLRB Br., at 43 n.5. While the Senate may have confirmed a person to one PAS position, "it is entirely conceivable that if [the same person] were nominated to [another PAS position], she might be rejected for any number of reasons, political or otherwise, in spite of her previous confirmation for [her current] post." Rosenberg, *Requirement of Reconfirmation*, *supra* at 20. Thus, there is no basis to conclude that Congress intended acting officials designated under Subsection

(a)(2) to be accorded greater flexibility than any other acting official.

B. At the time of the FVRA's enactment, the Senate was deeply concerned with attempts by the Executive to move Senate-confirmed officials to new PAS positions without Senate re-confirmation.

The Board's contention here that Senate confirmation decisions reflect a broad judgment regarding a nominee's qualification for PAS offices in general echoes a theory of the "fungibility" of PAS officials that the Executive has often invoked—and that the Senate has just as often opposed. The Senate Governmental Affairs Committee was keenly aware of and focused on this "fungibility" theory during the debate and drafting of the FVRA. The FVRA's legislative history substantially undermines the Board's position on this issue.

Under the Vacancies Act, on several occasions, the Executive sought to shift Senate-confirmed officials from one PAS position to another without Senate reconfirmation. In one particularly noteworthy case, the Department of Labor ("DOL") sought to move Anne H. Lewis from her Senate-confirmed role as Assistant Secretary for Public Affairs to the distinct PAS office of Assistant Secretary for Policy. Morton Rosenberg, Congressional Research Service, *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* (Jan. 14, 1998) ("*Validity of Designation*"), incorporated at S. Hrg.

105-495 (Mar. 18, 1998), at 97-98; *see also generally* Rosenberg, *Requirement of Reconfirmation*, *supra*. Relying on an OLC opinion, DOL took the position that Ms. Lewis did not require Senate confirmation to this new role, because she had already received Senate confirmation for the PAS office that she currently held. *See id.*; *Reassignment of Assistant Secretary of Labor Without Senate Reconfirmation*, 19 Op. OLC 274 (Nov. 2, 1995), *at* https://www.justice.gov/sites/default/files/olc/opinions/1995/11/31/op-olc-v019-p0274_0.pdf. Senator Kassebaum, Chairman of the Senate Labor Committee, "rejected the argument, specifically objecting to the challenge to the Committee's confirmation prerogative." Rosenberg, *Validity of Designation*, S. Hrg. 105-495, at 97. After a brief standoff, the Executive backed down. The President nominated Ms. Lewis as Assistant Secretary for Policy, and the Senate confirmed her to that position. *See* 141 Cong. Rec. S19,289 (Dec. 22, 1995).

The Executive's past reliance on this fungibility theory—and the Senate's resistance to that theory—played an important role in the debate from which the FVRA emerged. The Senate Committee that reported the FVRA received thorough testimony regarding past invocations of the fungibility theory. *See* S. Hrg. 105-495 (Mar. 18, 1998), at 43-44, 48-51; S. Rep. 105-250 (1998), at 10 (noting that *amicus* "also spoke of the problem of transferring assistant secretaries from one position to another without their undergoing Senate reconfirmation"). The standoff between Senator Kassebaum and DOL was specifically raised during the Committee hearing. *See* S. Hrg. 105-495, at 44.

And later in that hearing, a Committee member emphasized the office-specific nature of the Senate's confirmation decisions, observing: "How else do you know whether the [nominee's] qualifications are even relevant?" *Id.* at 51.

Moreover, during the debates over the FVRA, several frequently invoked examples of past encroachments on the Vacancies Act involved PAS officials who had been reassigned to other PAS positions without reconfirmation. Several Senators mentioned the Acting Solicitor General Walter Dellinger. *See, e.g.*, S. Hrg. 105-495, at 38 ("Another example [of violations of the Vacancies Act] is the Solicitor General."); 144 Cong. Rec. S6,416 (June 16, 1998) (identifying Mr. Dellinger's service as Solicitor General as among the "prominent examples of how the [Vacancies] Act was being ignored"). The Senate had previously confirmed Mr. Dellinger as the Assistant Attorney General in charge of OLC. But Mr. Dellinger subsequently assumed the vacant office of Solicitor General and served for an entire term of the Supreme Court without being re-nominated for that position. Rosenberg, *Validity of Designation*, *supra*, S. Hrg. 105-495, at 66. While the controversy surrounding Mr. Dellinger's role as Acting Solicitor General focused largely on the duration of his service, it is clear that there was frustration within the Senate that "no effort was made to seek Senate confirmation" for this new, more senior position. S. Hrg. 105-495, at 38.

In addition, one of the key factors that spurred the enactment of the FVRA was the decision in *Doolin Security Savings Bank* v. *Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998) (holding that the 120-

day limit imposed by the Vacancies Act on acting officials did not begin until an acting official assumed the vacant office). S. Rep. 105-250, at 5-9 (discussing the significance of the *Doolin* decision). *Doolin* involved the "designat[ion of] a Senate-confirmed official from the Department of Housing and Urban Development to serve as acting director" of the Office of Thrift Supervision. *Id.* at 6; *see also* Morton Rosenberg, Congressional Research Service, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* 7-8 (Nov. 2, 1998) ("*New Vacancies Act*"). Senators repeatedly identified the *Doolin* decision as evidence of the need to significantly strengthen the FVRA. *See, e.g.*, S. Rep. 105-250, at 5-9, 11, 12, 20.

The frequent references to Mr. Dellinger and the *Doolin* decision during debate of the FVRA demonstrate that the Senate viewed designations under Subsection (a)(2) as potential opportunities for the Executive to seek to evade the Senate confirmation process. Such designations are not inherently suspect; both the Vacancies Act and the FVRA have expressly permitted them.[2] But neither

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[2] However, several Senators did express practical concerns about widespread designation of acting officials under Subsection (a)(2). These Senators noted that when Senate-confirmed officials are designated to fill a different PAS office on an acting basis, the additional duties of that new position may either interfere with their ability to discharge the office for which the Senate confirmed them or force them to abandon that post altogether. *See, e.g.*, 144 Cong. Rec. S11,032 (Sept. 28, 1998) (Sen. Glenn) ("[D]o we really want a President to designate a PAS from HUD to assume the additional responsibilities of a PAS position at Department of Education? Or vice versa? Do we

are such designations inherently innocuous, as the Board suggests. *See* NLRB Br., at 42 (contending that an acting official designated under Subsection (a)(2) "is unlikely to have been directed to do so in an attempt to circumvent the Senate's advice-and-consent role"). As the Ninth Circuit noted, "[a] designation of a prior Senate-confirmed officer to the acting position could just as easily be used for 'manipulation' as a first assistant of insufficient tenure." *Hooks* v. *Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 561 (9th Cir. 2016). Thus, the FVRA's legislative history undermines the Government's contention that there was no reason for Congress to apply Subsection (b)(1)'s limitation to acting officials designated under Subsection (a)(2).

II. The FVRA's Legislative History Indicates That Applying Subsection (b)(1)'s Limitation to Acting Officials Designated Under Subsection (a)(3) Comports with the FVRA's Objectives.

The Board claims that applying Subsection (b)(1)'s limitation to acting officials designated under Subsection (a)(3) "would undermine the statute's goal of enabling service by career officials that Members of Congress had described as especially qualified—by preventing such individuals from serving [on an acting basis] if the President also regarded them as most qualified to occupy the PAS position on a permanent basis." NLRB Br., at 23. The Board's

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want these folks who already have plenty of responsibility as it is to assume the added responsibility of a second position?").

position both overstates the effect that Subsection (b)(1) would have on the President's ability to nominate PAS officials, and overstates the breadth of the congressional purposes underlying Subsection (a)(3).

A. Congress specifically contemplated that the FVRA might force the president to choose between designating a particular individual as an acting official and nominating that individual for the same PAS office on a permanent basis, and Congress concluded that such an effect would not disturb the President's ability to nominate "in any way."

The Board claims that applying Subsection (b)(1)'s limitation to acting officials designated under Subsection (a)(3) would unreasonably limit the President's ability to nominate career civil servants to PAS positions, because it would prevent such individuals from simultaneously serving as an acting official and as a nominee for the same office on a permanent basis. NLRB Br., at 23, 39-40. In the Board's view, applying Subsection (b)(1) to such officials would present the President with a "Hobson's choice": designate the career civil servant to the PAS office on an acting basis, allowing her to hold the position immediately but preventing her from holding it permanently; or designate a less qualified acting official to hold the office now, while nominating the more qualified civil servant for the position on a permanent basis. *Id.* at 41. The Board contends that this dilemma conflicts with the flexibility that

Congress intended the FVRA to provide the President.

To the contrary, the Senate Committee Report regarding the FVRA demonstrates that Congress specifically recognized that the statute might present the President with such a dilemma. But rather than characterizing it as an untenable Hobson's choice, Congress concluded that it did not impinge on the President's nomination power at all. To the extent legislative history is viewed as authoritative, this Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) (quotation and brackets omitted). "Committee Reports are more authoritative than comments from the floor . . ." *Id.* at 76 (quotation omitted). The weight accorded to Committee Reports reflects the fact that such Reports are often the primary source on which Members of Congress rely when considering a bill. *See* KATZMANN, JUDGING STATUTES, *supra*, at 17-22, 130 n.5.

The Committee Report here demonstrates that the Senate Committee specifically contemplated that the FVRA might force the President to choose between designating a particular individual as an acting official under Subsection (a) and nominating that individual for the same office on a permanent basis. And the Committee expressly concluded that such an effect would not limit the President's ability to nominate. Under the version of the FVRA before the Committee, a first assistant could not

simultaneously serve as the acting officer and the permanent nominee unless he or she had been first assistant for at least 180 out of the preceding 365 days. *See* S. Rep. 105-250, at 25; *see also id.* at 13.

The Committee recognized that this provision would have precisely the effect that the Board complains of here. "If the President nominates the former first assistant, who served for less than 180 of the 365 days preceding the vacancy, to the permanent position, the first assistant must cease performing the functions and duties of the office." S. Rep. 105-250, at 13. While the Committee acknowledged this effect of the predecessor to Subsection (b)(1), the Committee did not view that effect as a vice. The Committee emphasized that "***[t]he President's power to nominate is not disturbed in any way***; however, if he chooses to nominate a brief-serving first assistant, that person may no longer serve as the acting officer." *Id.* (emphasis added). This conclusion did not rest on any considerations specific to first assistants. *See id.* The same analysis would apply to acting officials designated under Subsections (a)(2) or (a)(3). While the Minority Members of the Committee criticized several aspects of the original version of the FVRA, none expressed any concern that this limitation on simultaneous service as an acting official and a permanent nominee would hinder the President's ability to nominate PAS officials or otherwise undermine any "flexibility" intended by the FVRA. *See id.* at 30-33 (Additional Views of Senators Glenn, Levin, Lieberman, Cleland, and Torricelli); 34-36 (Minority Views of Senators Durbin and Akaka).

Applying Subsection (b)(1)'s limitation to acting officials designated under Subsection (a)(3)

does not prevent the President from nominating qualified career civil servants to PAS positions. The President remains entirely free to designate such persons to occupy PAS positions temporarily under Subsection (a)(3), and the President remains entirely free to nominate such persons to PAS positions on a permanent basis. The President simply cannot do both at the same time. In this situation, "[t]he President's power to nominate in not disturbed in any way . ." S. Rep. 105-250, at 13. The Senate Committee expressly contemplated—and expressly approved—the effect that the Board here describes as an impermissible Hobson's choice. NLRB Br., at 41. Thus, the interpretation of Subsection (b)(1) adopted by the Court of Appeals fully accords with the Senate Committee's understanding of how the FVRA would operate. The far broader interpretation urged by the Board would not only depart from the express understanding of the Senate Committee, but also threaten to afford the President so much "flexibility" that he or she could entirely avoid Senate confirmation for many long-serving holders of PAS offices, thereby pushing the outer limits of the Constitution's separation-of-powers provisions. *See Mistretta* v. *United States*, 488 U.S. 361, 383 (1989) (describing the Court's "separation-of-powers inquiry as focusing on the extent to which a provision of law prevents [a Branch] from accomplishing its constitutionally assigned functions" (quotation and brackets omitted)). The Court should not needlessly interpret the FVRA to raise such serious constitutional problems, especially when such an interpretation conflicts with both the plain text of the statute and the intent of the Senate Committee.

B. The Board overestimates the breadth of the congressional purposes underlying Subsection (a)(3).

On the Board's telling, Congress added Subsection (a)(3) for the broad purpose of facilitating and encouraging the appointment of career civil servants to PAS positions. NLRB Br., at 23, 39-40. Applying Subsection (b)(1)'s limitation to acting officials designated under Subsection (a)(3) would undermine this broad purpose by forcing the President to choose between designating such a person as an acting official or nominating the person to the PAS office on a permanent basis. *Id.*

In reality, however, the primary congressional purposes underlying Subsection (a)(3) were substantially narrower and more modest that the Board suggests. The version of the FVRA reported by the Senate Governmental Affairs Committee permitted only two categories of individuals to temporarily fill vacant PAS offices: a longstanding first assistant to the vacant office or a PAS official who had already received Senate confirmation for another position. S. Rep. 105-250, at 25. In the Committee Report, Senators Durbin and Akaka identified a significant potential problem with limiting acting officials to these two categories. "Early in the Administration of a newly-inaugurated President, virtually the only person who could serve as acting officers would be the first assistants from the prior Administration, since transferring another PAS person would merely create a new vacancy elsewhere." *Id.* at 34 (Minority Views). If a new President were limited to selecting from only the prior

Administration's first assistants or officials who had already been confirmed by the Senate, the office might simply remain vacant until a permanent nominee could be confirmed.

These concerns were echoed during the floor debates. Senator Levin argued:

> [T]he restriction [of acting officials to first assistants and Senate-confirmed PAS officials] may be operating particularly harshly at the start of a new administration when many vacancies exist. At such times, not many first assistants may be holding over from previous administrations. Therefore, the first assistant slots may be empty, also. Similarly, few other Senate-confirmed officers will exist that the President could choose from to serve in a vacant position.

144 Cong. Rec. S11,037 (Sept. 28, 1998). Acknowledging similar considerations, Senator Glenn proposed "an amendment to add a third category which would include qualified individuals of a certain level or higher who are already within an agency in which a vacancy occurs." *Id.* at 11,032. Among other benefits, adding this third category would "allow[] a larger category of who can act at the beginning of an administration to keep government functioning at a time when there are not many PAS officials." *Id.*

The version of the FVRA ultimately enacted by Congress contained a compromise provision addressing these concerns. *See* Omnibus

Consolidated and Emergency Supplemental Appropriations Act, 112 Stat. 2681-611, § 151(b) (1998). During the Senate debate of this final version of the FVRA, the addition of Subsection (a)(3) was justified on the ground that "[c]oncerns had been raised that, particularly early in a presidential administration, there will sometimes be vacancies in first assistant positions, and that there will not be a large number of Senate confirmed officers in the government." 144 Cong. Rec. S12,822 (Oct. 21, 1998).

Thus, the congressional debate surrounding the addition of Subsection (a)(3) shows that most Senators viewed the Subsection primarily, if not exclusively, as a means to address a relatively narrow problem, *i.e.*, temporarily filling PAS positions when neither a first assistant nor another PAS official were available, especially at the beginning of a new administration when that problem often is most acute. Rather than envisioning Subsection (a)(3) as a broad mandate for facilitating the nomination of career civil servants to PAS offices, even many of the Subsection's strongest proponents viewed it only as a source of *temporary* PAS officials. *See, e.g.*, S. Rep. 105-250, at 31 (Additional Views) (considering the possibility of "a third category of individuals to *temporarily* fill positions" (emphasis added)).

The interpretation attributed to Subsection (b)(1) by the Court of Appeals fully comports with this congressional vision of Subsection (a)(3). Under that interpretation, the President can freely appoint longstanding GS-15 officials to temporarily fill a PAS office until the Senate can confirm a permanent official. Subsection (a)(3) thereby grants the President the added flexibility that many of the

provision's proponents believed necessary "where there is no first assistant, and the President must turn to another PAS official to temporarily fill the slot," especially "at the beginning of an administration to keep government functioning at a time when there are not many PAS officials." 144 Cong. Rec. S11,032 (Sen. Glenn). Thus, the interpretation adopted by the Court of Appeals is fully consistent with the congressional purposes underlying Subsection (a)(3).

III. Neither the Alleged Lack of Strong Congressional Opposition to the Executive's Past Violations of the FVRA Nor Non-Binding Governmental Interpretations of the FVRA Justify Adopting the Executive's Interpretation of the Act.

The Board contends that aspects of congressional and executive practice support its interpretation of Subsection (b)(1). First, the Board claims that, because Congress has not challenged past instances in which non-first-assistant acting officials were nominated to the same PAS office, this suggests that Congress intended the FVRA to permit such actions. *See* NLRB Br., at 49-50. Second, the Board contends that its interpretation of the FVRA is strengthened by the fact that OLC and the GAO adopted the same interpretation soon after the statute's enactment and have adhered to that interpretation consistently since then. *Id.* at 50-52. Neither of these contentions has merit.

A. The alleged lack of strong congressional opposition to the Executive's past violations of the FVRA does not support the Executive's interpretation of the statute.

The Board contends, in essence, that because Congress has not challenged past instances in which non-first-assistant acting officials were nominated to the same PAS office, the FVRA must permit such actions. NLRB Br., at 49-50. The Board notes that "not only can the Senate reject nominees it concludes are serving unlawfully, but Congress has ample incentive and ability to enact new legislation to displace an interpretation by the Executive that it sees as trenching on its prerogatives." *Id.* at 49. The Board contrasts Congress's purported acquiescence here with the forceful congressional response to violations of the Vacancies Act. *Id.* This argument has no merit.

First, the alleged lack of strong congressional opposition to the Executive's unlawful conduct cannot alter the plain meaning of the FVRA or waive the structural safeguards protected by the statute. In the context of the FVRA, "[t]he issue is not simply the prerogative of the Senate. Like other structural constitutional provisions, the Appointments Clause was designed to protect the liberty of the people." S. Rep. 105-250, at 8; *see also Freytag* v. *Comm'r of Internal Revenue*, 501 U.S. 868, 880 (1991) ("The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic."); *Mistretta*, 488 U.S. at 380 ("[T]he separation of powers into three coordinate

Branches is essential to the preservation of liberty."). Because the FVRA operates to preserve the separation of powers established by the Constitution, putative congressional inaction can neither waive nor undermine the statute's requirements. "[T]he separation of powers does not depend . on whether the encroached-upon branch approves the encroachment." *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010) (quotation omitted); *see also Freytag*, 501 U.S. at 880 ("[T]he [Appointments] Clause forbids Congress to grant the appointment power to inappropriate members of the Executive Branch. Neither Congress nor the Executive can agree to waive this structural protection."); *Clinton* v. *City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring) ("It is no answer, of course, to say that Congress surrendered its authority by its own hand . . ."). "The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. Abdication of responsibility is not part of the constitutional design." *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring) (internal citations omitted). The Court should not rely on putative congressional inaction to undermine the FVRA's important protections of the separation of powers.

Second, the Board relies on an unrealistic view of congressional action. Violations of the FVRA present significant issues warranting congressional attention, but they are not the only significant issues faced by Congress over the past 18 years. "Congressional life is marked by incredible pressure—such as pressures of the permanent

campaign for reelection, raising funds, balancing work in Washington and time in the district, balancing committee and floor work in an environment of increasing polarization, and balancing work and family responsibilities. It is also now more intense than in the past." KATZMANN, JUDGING STATUTES, *supra* at 17 (footnote omitted). The fact that the myriad other matters facing Congress have taken priority over addressing violations of the FVRA does not render the latter unimportant.

Moreover, Members of Congress may not have been aware of the widespread and serious violations of the FVRA. As Senator Byrd, a leading proponent of the FVRA, noted regarding the relatively weak congressional opposition to decades of the Executive's flouting of the Vacancies Act's requirements:

> Now, we are busy men and women. I have been around a long time. I was not fully aware that this was going on until I wrote to the President and then received his response and then wrote to the Attorney General and receive a response from someone else in her Department. And then I became a little more aware of it and I have to assume that this is probably the case with most other members, if not all.

S. Hrg. 105-495, at 13. But Senator Byrd did not view the lack of congressional awareness of—and lack of congressional action against—violations of the Vacancies Act as evidence that the Executive had

acted properly or that the Senate had acquiesced to Executive overreach. To the contrary, he chastised Senators (including himself) for their "failure to aggressively demand strict compliance with the provisions of the Vacancies Act." *Id.* And he urged his colleagues to "awaken to the threat posed by circumventions by the executive branch of the appointments clause" and to pass the FVRA. 144 Cong. Rec. S11,025 (Sept. 28, 1998).

Here, too, even if the demands of congressional life and other policy priorities may have prevented Congress from identifying and firmly opposing Executive nomination practices, the Court should not construe that lack of opposition as approval of the Executive's interpretation of the FVRA. The Court should instead give effect to the plain language of the statute, which preserves the important separation of powers established by the Appointments Clause. As Senator Byrd noted, "each time a vacancy is filled by an individual in violation of the Act yet another pebble is washed off the riverbank of the Senate's constitutional role and, . . . as more and more of these pebbles tumble downstream, the constitutional riverbank weakens until, finally, it will collapse." S. Hrg. 105-495, at 14.

B. The OLC and GAO opinions cited by the Board do not justify adopting the Board's interpretation of Subsection (b)(1).

The Board contends that the "clear and contemporaneous" interpretations of Subsection (b)(1) issued by OLC and the GAO support the

Executive's position in this case. NLRB Br., at 50. As an initial matter, neither OLC opinions nor GAO opinions are entitled to any deference in the interpretation of a statute. *See Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment); *Delta Data Sys. Corp.* v. *Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984). Like any other non-authoritative interpretation of a statute, the Court should rely on these sources only to the extent that the Court finds their legal analysis persuasive. *See id.* Here, the opinions issued by OLC and the GAO do not provide a persuasive basis for adopting the Board's proposed interpretation of Subsection (b)(1).

The OLC opinion on which the Board principally relies does not closely analyze the interpretative questions at issue in this case. The relevant portion of the OLC opinion provides, *in toto*:

> **Question 15.** Does [Subsection (b)(1)'s] limitation on the ability to be both the nominee and the acting officer apply only to first assistants, or does it also apply to persons who qualify to serve as an acting officer under other provisions of the Vacancies Reform Act?
>
> **Answer.** The limitation on the ability to be the nominee for the vacant position and to serve as the acting officer applies only to persons who serve as acting officers by virtue of having been the first assistant to the office. If someone is serving in an acting capacity on another basis, i.e., as

> a PAS or a senior agency employee designated by the President, this particular limitation does not apply.

Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 64 (Mar. 22, 1999). The OLC opinion neither addresses nor acknowledges any of the important textual considerations that led the Court of Appeals to conclude that Subsection (b)(1) applies to all persons designated under Section (a). Nor did OLC raise the policy and legislative-history arguments on which the Board relies in this case. Instead, the OLC opinion provides only a conclusory and cursory answer that is consistent with the memorandum's limited purpose of "provid[ing] general guidance on the [FVRA]." *Id.* at 60.

In addition to the cursory nature of the analysis contained in the OLC opinion, a further consideration weighs against relying on the OLC opinion in this context. One of the primary factors that spurred the enactment of the FVRA was the Department of Justice's contention that the Attorney General could make temporary appointments under the Department's organic statute, without satisfying the Vacancies Act—an interpretation that the Senate had expressly rejected, but to which OLC had given its imprimatur. *See* S. Rep. 105-250, at 4; Rosenberg, *Validity of Designation*, *supra*, S. Hrg. 105-495, at 80-82; Rosenberg, *The New Vacancies Act*, *supra* at 3-5. Indeed, Congress enacted the FVRA in large part to protect the Senate's advice-and-consent role against perceived attempts by OLC to weaken it. Given that statutory background, the Court should be especially

hesitant to defer to the cursory opinion issued by OLC in this context.

The GAO opinion cited by the Board provides even less support to the Board's position than does the OLC opinion. *See Letter from Carlotta C. Joyner to Sen. Fred Thompson, Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R (Feb. 23, 2001), *available at* http://www.gao.gov/assets/80/75036.pdf. Unlike the OLC opinion, the GAO opinion does not state that Subsection (b)(1) applies only to acting officials serving under Subsection (a)(1). *See id.* Indeed, its discussion of acting officials designated under Subsections (a)(2) and (a)(3) does not even mention the possibility of such persons being nominated at all. *See id.* at 3-4. In contrast, in its discussion of acting officials serving under Subsection (a)(1), the GAO opinion states that "[i]f the President nominates the first assistant for the vacant position, the first assistant may continue to serve as the acting official for that position only if (1) the person served as first assistant for 90 days or more during the 365-day period prior to the vacancy, or (2) the position of the first assistant is itself a PAS position and the Senate approved the appointment of the first assistant to that position." *Id.* at 2.

The Board apparently interprets this discrepancy as signaling that Subsection (b)(1) applies only to persons acting under Subsection (a)(1), but not to those acting under Subsection (a)(2) or (a)(3). *See* NLRB Br., at 50. But the GAO opinion does not state this conclusion—it simply does not address whether the limitations of Subsection (b)(1)

apply to an acting official designated under Subsection (a)(2) or (a)(3). The opinion certainly includes no analysis of the text, structure, or legislative history of the FVRA that this Court could view in any way as persuasive. Thus, the GAO opinion is entitled to, if anything, less weight than the OLC opinion.

IV. For More Than Two Centuries, Congress Has Strictly Limited the President's Ability to Designate Acting PAS Officials in Order to Preserve the Senate's Advice-and-Consent Role.

The Board contends that "[s]ince the earliest days of our Nation, Congress has afforded the President substantial latitude to designate government officials to perform the duties of PAS offices on a temporary basis." NLRB Br., at 4. To the contrary, for more than 200 years, Congress has strictly limited the President's use of temporary PAS officials, consistently viewing such officials as potential threats to the Senate's advice-and-consent role. "The manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Freytag*, 501 U.S. at 883 (quotations and internal citation omitted). To be sure, in 1792, Congress enacted a statute permitting the President to appoint acting officials who could serve indefinitely. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281. But only three years later,

Congress withdrew that broad authority and limited the duration of acting service. Act of Feb. 13, 1795, ch. 21, 1 Stat. 415 (limiting term of acting officials to six months).

Since 1795, Congress has consistently and repeatedly imposed tight limitations on the President's designation of acting officials. For example, in 1863, Congress significantly narrowed the classes of persons who could serve as an acting official. Act of Feb. 20, 1863, ch. 45, 12 Stat. 656. And in 1868, Congress further stiffened the restrictions on acting officials, capping the length of acting service at ***10 days***. Act of July 23, 1868, ch. 227, § 3, 15 Stat. 168 (Vacancies Act). "The clear intent of the Vacancies Act from its outset was to prevent the President from delaying sending forth nominations for advice and consent positions which could thereby evade the Senate confirmation prerogative . . . ." Rosenberg, *Validity of Designation*, S. Hrg. 105-495, at 83.

Following the 1868 Act, numerous Attorneys General issued opinions consistently concluding that the President must comply strictly with the Act's demanding requirements, regardless of whether such compliance imposed practical difficulties. *See id.*, at 68-69 (citing seven Attorney General Opinions from five different Presidential Administrations). "[T]hese opinions show that Congress ha[d] been on notice for more than a century that the Vacancies Act [was] generally strictly and narrowly interpreted [by the Executive]." *Olympic Fed. Savings & Loan Ass'n* v. *Director*, 732 F. Supp. 1183, 1198 (D.D.C.), *appeal dismissed as moot*, 903 F.2d 837 (D.C. Cir. 1990).

Far from a pattern of "afford[ing] the President substantial latitude" in this area, NLRB Br. at 4, Congress has jealously guarded the Senate's advice-and-consent role. The FVRA reflects only the most recent chapter in this congressional effort to give effect to the Appointments Clause, which "is among the significant structural safeguards of the constitutional scheme." *Edmond* v. *United States*, 520 U.S. 651, 659 (1997).

CONCLUSION

The Court should affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SW GENERAL, INC., doing business as SOUTHWEST AMBULANCE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Section 3345(b)(1) of the Federal Vacancies Reform Act, 5 U.S.C. § 3345, *et seq.*, limits when a permanent nominee for a vacant office may also serve temporarily as the acting official. The question presented is whether that limitation applies to all temporary officials serving under 5 U.S.C. § 3345(a), or whether it is irrelevant to officials who assume acting responsibilities under Subsections (a)(2) and (a)(3).

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Buckley v. Valeo, 424 U.S. 1 (1976) 8, 13

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Clinton v. City of New York, 524 U.S. 417 (1998) 11, 13

Edmond v. United States, 520 U.S. 651 (1997) 8

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) 2, 16

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In re Special Proceedings, 842 F. Supp. 2d 232 (D.D.C. 2012) 22

Mistretta v. United States, 488 U.S. 361 (1989) 5, 6

Morrison v. Olsen, 487 U.S. 654 (1988) 6

Myers v. United States, 272 U.S. 52 (1926) 14, 17

NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) 1, 9, 16

Ohio v. United States Army Corps of Eng'rs, 803 F.3d 804 (6th Cir. 2015) 30

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 17

Pottawattamie Cty. v. McGhee, 558 U.S. 1103 (2010) 23

Pub. Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989) 16

Rapanos v. United States, 547 U.S. 715 (2006) 30

TABLE OF AUTHORITIES – Continued

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Util. Air Regulation Grp., 134 S. Ct. 2427 (2014) 1, 30

Yates v. United States, 135 S. Ct. 1074 (2015) 23

Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579 (1952) 6, 9, 13, 17

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50 U.S.C. § 3037(b) 24

RULES

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Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

About the Office of the Administrator, U.S. Environmental Protection Agency, https://www.epa.gov/aboutepa/about-office-administrator (last visited Sept. 20, 2016) 30

Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. Cal. L. Rev. 913 (2009) 15

TABLE OF AUTHORITIES – Continued

Page

Carol Galante Biography, UC Berkeley Faculty Directory, http://ced.berkeley.edu/ced/faculty-staff/carol-galante (last visited Sept. 20, 2016) 28

Congress.gov Nominations, https://www.congress.gov/nomination/110th-congress/2205?q=%7B%22search%22%3A%5B%22Matthew+Friedrich%3A%22%5D%7D&resultIndex=1 (last visited Sept. 20, 2016) 23

Congress.gov Nominations, https://www.congress.gov/nomination/112th-congress/86?q=%7B%22search%22%3A%5B%22Lafe+Solomon%22%5D%7D&resultIndex=2 (last visited Sept. 20, 2016) 18

Congress.gov Nominations, https://www.congress.gov/nomination/112th-congress/1064?q=%7B%22search%22%3A%5B%22Carol+J.+Galante%22%5D%7D&resultIndex=1 (last visited Sept. 20, 2016) 28

Congress.gov Nominations, https://www.congress.gov/nomination/113th-congress/506?q=%7B%22search%22%3A%5B%22Lafe+Solomon%22%5D%7D&resultIndex=1 (last visited Sept. 20, 2016) 19, 21

Del Quentin Wilbur, *Judge Orders Probe of Attorneys in Stevens Case*, Washington Post, April 8, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/04/07/AR2009040700338.html 22

TABLE OF AUTHORITIES – Continued

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Del Quentin Wilber, *Stevens Found Guilty on 7 Counts*, Washington Post, Oct. 28, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/10/27/AR2008102700289.html 22

Erin Fuchs, *The Tragic Story Of A Lawyer Who Killed Himself After A Botched Prosecution*, Business Insider, May 19, 2014, http://www.businessinsider.com/sidney-powell-on-nicholas-marsh-and-ted-stevens-2014-5 22

Federal Employers, United States Department of Labor, https://www.dol.gov/odep/topics/federalemployment.htm (last visited Sept. 20, 2016) 29

Joe Light, *Top Obama Housing Official Carol Galante to Step Down*, The Wall Street Journal, Aug. 11, 2014, http://www.wsj.com/articles/SB10001424052702304526204579101142224548428 28

Justice for Ted Stevens, The Wall Street Journal, Feb. 20, 2009, http://www.wsj.com/articles/SB123509358392428915 22

Lin-Manuel Miranda: Hamilton: Original Broadway Cast Recording (Atlantic Records 2015).....10

Madison Debates September 15, The Avalon Project: Documents in Law, History and Diplomacy, Yale Law School Lillian Goldman Law Library, http://avalon.law.yale.edu/18th_century/debates_915.asp (last visited Sept. 20, 2016) 3

TABLE OF AUTHORITIES – Continued

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Nick Timiraos, *FHA Will Require $1.7 Billion From Treasury*, The Wall Street Journal, Sept. 27, 2013, http://www.wsj.com/articles/SB10001424052702304526204579101142224548428.....28

NPR, *Report: Prosecutors Hid Evidence In Ted Stevens Case*, March 15, 2012, http://www.npr.org/2012/03/15/148687717/report-prosecutors-hid-evidence-in-ted-stevens-case.....22

Organization, Mission & Functions Manual: Attorney General, Deputy and Associate, https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general (last visited Sept. 20, 2016).....20

Paul Kane, *Sen. Ted Stevens Loses Reelection Bid*, Washington Post, Nov. 19, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/11/18/AR2008111803227.html.....23

Reorganization Plan No. 3 of 1970, 84 Stat. 2086-89, https://www.gpo.gov/fdsys/pkg/STATUTE-84/pdf/STATUTE-84-Pg2086.pdf (last visited Sept. 20, 2016).....30

The Federalist No. 45 (James Madison) (Clinton Rossiter ed., 1999).....10

The Federalist No. 47 (James Madison) (Clinton Rossiter ed., 1999).....2, 5, 6

The Federalist No. 67 (Alexander Hamilton) (Clinton Rossiter ed., 1999).....7

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The Federalist No. 77 (Alexander Hamilton) (Clinton Rossiter ed., 1999) 9

INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, regularly files *amicus curiae* briefs with this Court in cases such as *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), and litigates regularly before the Supreme Court, including such cases as *Utility Air Regulation Group, et al. v. EPA*, 134 S. Ct. 2427 (2014).

SLF's direct interest in this case stems from its profound commitment to protecting America's legal heritage. That heritage includes the separation of powers enshrined in the Constitution, which is a vital component of the Nation's laws and a critical safeguard of political liberty. This case concerns a separation of powers violation by the President and thus implicates one of SLF's core concerns.

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[1] All parties have consented to the filing of this brief by blanket or individual letter. *See* Sup. Ct. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

SUMMARY OF ARGUMENT

The vast expanse of the administrative state is an undeniable reality of modern American life. "The administrative state wields vast power and touches almost every aspect of daily life." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010)). It is no secret that "as a practical matter [agencies] exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *Id.* at 1877-78.

It is this very concentration of power that drew the ire and deep concern of the Founders, because "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed., 1999). "The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government." *Freytag v. Comm'r*, 501 U.S. 868, 870 (1991).

Accordingly, the Framers put masterfully crafted safeguards in place to allow each branch to jealously guard its duties and prerogatives. One such power that was the subject of great concern during the Constitutional Convention of 1787 was the appointment power.

Some Delegates favored vesting the power in the President; others favored Congress. So opposed were these parties that the matter, even after lengthy debate, went unresolved for months. Madison Debates September 15, The Avalon Project: Documents in Law, History and Diplomacy, Yale Law School Lillian Goldman Law Library, http://avalon.law.yale.edu/18th_century/debates_915.asp (last visited Sept. 20, 2016). The controversy was not resolved until the Convention's end when the Framers devised a compromise: they vested the appointment power for principal federal officers in the President and Senate jointly, and they allowed Congress alone the power to decide how inferior officers are appointed. *Id.*

In the instant case, it is the reason for those boundaries that is implicated. "The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were *accountable to political force and the will of the people*." *Freytag*, 501 U.S at 884 (emphasis added). In the modern era, it is the Federal Vacancies Reform Act (FVRA), 5 U.S.C. § 3345, *et seq.*, that has preserved the Senate's role through clear and articulable standards for when the chamber needs to approve of the person serving as an acting appointee. But the past three presidents have, regardless of whether by manipulative intent or mere ignorance, circumnavigated the requirements of the statute. Pet. Br. at 13.

Those individuals who have served and are currently serving in violation of the FVRA were and are acting in positions of great authority with massive

amounts of power, but with no accountability to the legislative branch. Acting officials previously and currently serving in violation of the FVRA exercise vast civil and criminal prosecutorial discretion, wield great power over large sectors of the U.S. economy and trade, implement the Executive's domestic policy agenda, regulate energy and the environment, and even control decision-making power in foreign policy and national security.

These positions and appointments are not mere cogs in the administrative machine. On the contrary, and by the government's own admission, Pet. Br. at 16, these are extremely high-ranking positions, often times the second in command for executive agencies, branches of the military, and entire cabinet departments. The individuals in these positions have power over and are responsible for a huge amount of the administrative arm's actual, day-to-day operation. The fact that they serve without any check on their authority goes against not only the Framers' intent, but also runs counter to the modern statute enacted to preserve that intent.

ARGUMENT

I. Preserving the separation of powers through our system of checks and balances is a constitutional necessity.

Preservation of the separation of powers was a foremost goal of the Framers in crafting the Constitution. As James Madison clearly articulated, "the preservation of liberty requires that the three great departments of power should be separate and distinct." The Federalist No. 47, at 297 (James Madison) (Clinton Rossiter ed., 1999). And the Framers should know – they crafted a system clearly and intentionally contrary to that of the British government; its system operates to this day by the fusion of powers. *See, e.g., id.* at 299 (describing the British Constitution, where the three branches "are by no means totally separate and distinct from each other").

The American system is one of checks and balances. As opposed to a system in which the branches would be entirely isolated, the Framers opted for a system that does allow for a necessary degree of flexibility. *See Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("[T]he Framers did not require – and indeed rejected – the notion that the three Branches must be entirely separate and distinct."). In articulating his approach, Madison clarified that it did not conflict with Montesquieu, whose tenets underscored major components of the Constitution. Madison explained:

> [Montesquieu] did not mean that these departments ought to have no *partial agency* in,

> or no *control* over, the acts of each other. His meaning . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.

The Federalist No. 47, at 299. The boundaries on this flexibility, however, are undeniable. "In adopting this flexible understanding . . we simply have recognized Madison's teaching that the greatest security against tyranny – the accumulation of excessive authority in a single Branch – lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch." *Mistretta*, 488 U.S. at 381. *See also Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (articulating that "[the Constitution] enjoins upon its branches separateness but interdependence, autonomy but reciprocity"). Stated succinctly: "[T]he Constitution diffuses power the better to secure liberty." *Morrison v. Olsen*, 487 U.S. 654, 694 (1988) (internal quotations omitted).

A. The Senate's advice and consent of executive appointments is a critical component of separation of powers.

One such check on the accumulation of excessive authority in either the Executive or the Legislature is the Appointments Clause. Article II, Section 2, Clause 2 of the Constitution provides that the President "shall

nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." U.S. Const. art. II, § 2, cl. 2. *See also* The Federalist No. 67, at 408 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (explaining that the only exception to this duality is the President's recess appointment power, Hamilton noted that "[t]he ordinary power of appointment is confined to the President and Senate *jointly*. . .").

Indeed, the Framers knew this to be a power rife with the ability for overreach and corruption. "The manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Freytag*, 501 U.S. at 883 (internal quotations and citation omitted). The record from the Constitutional Convention of 1787 "indicates the Framers' determination to limit the distribution of the power of appointment." *Id.* at 884. Therefore,

> The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch. The Appointments Clause not only guards against this encroachment but also preserves another

> aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.

Id. at 878 (internal citation omitted).

The separation of powers enshrined in the Constitution's treatment of federal appointments – through the checks and balances provided by the Senate's advice and consent power – is an integral part of that safeguard. As this Court has explained, "the Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 125 (1976)).

The Senate's role in confirming nominees through its advice and consent "serves both to curb executive abuses of the appointment power, and to promote a judicious choice of [persons] for filling the offices of the union." *Id.* (citations and quotations omitted). Indeed, this Court as recently as 2014 has recognized the importance of this role of the appointment power.

> The Federalist Papers make clear that the Founders intended this method of appointment, requiring Senate approval, to be the norm [T]he need to secure Senate approval provides "an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice,

> from family connection, from personal attachment, or from a view to popularity."

NLRB v. Noel Canning, 134 S. Ct. 2550, 2558-59 (2014) (quoting The Federalist No. 76, at 513 (Alexander Hamilton) (Jacob Cooke ed., 1961)). In other words, one purpose of the Senate's role in confirmation is to curb the President's bias, *whether subconscious or intentional* and for whatever reason it might exist, in staffing his cabinet, agencies, federal courts, and the like. Over 60 years ago, in the *Steel Seizure Case*, Members of the Court warned that the "accretion of dangerous power" is spawned by "unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Steel Seizure Case*, 343 U.S. at 594 (Frankfurter, J., concurring).

The reasoning behind this logical check on the appointment power makes perfect sense. As Hamilton explained:

> The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate, aggravated by the consideration of their having counteracted the good intentions of the executive. If an ill appointment should be made, the executive, for nominating, and the Senate, for approving, would participate, though in different degrees, in the opprobrium and disgrace.

The Federalist No. 77, at 459-60 (Alexander Hamilton) (Clinton Rossiter ed., 1999). It is this accountability to,

ultimately, the democratic process[2] that underlies the intent of the balance of power, and this integral safeguard must be guarded closely so that it shall indeed continue to outlive Hamilton in the present day.[3]

In the modern era, this check is more relevant than ever before. "[T]he authority administrative agencies now hold over our economic, social, and political activities," *City of Arlington*, 133 S. Ct. at 1878, stands in stark contrast to the government of enumerated powers the Framers envisioned. Our Founding Fathers sought to create a government structure limited in nature – as James Madison explained in an effort to ease concerns that the proposed national government would usurp the People's power to govern themselves: "The powers delegated by the proposed Constitution to the federal government are few and defined. . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . ." The Federalist No. 45, at 289 (James Madison) (Clinton Rossiter ed., 1999). Today's wide-reaching "'administrative state with its reams of regulations would leave [the Founders] rubbing their eyes.'" *City of Arlington*, 133 S. Ct. at 1878 (quoting

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[2] Before the passage of the Seventeenth Amendment allowing the direct election of senators, however, the original Hamiltonian accountability directly to the voter would have been more attenuated. U.S. Const. art. I, § 3, cl. 1, *amended by* U.S. Const. amend. XVII.

[3] "God help me and forgive me, I wanna build something that's gonna outlive me." Lin-Manuel Miranda: Hamilton: Original Broadway Cast Recording (Atlantic Records 2015).

Alden v. Maine, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). As time marches on, the administrative state becomes larger yet. "[I]n the last 15 years, Congress has launched more than 50 new agencies. And more are on the way." *Id.* (citation omitted). "It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at 1879 (internal citation omitted).

Though the growth of the administrative state in and of itself may not exactly be "the very definition of tyranny," the lack of accountability of those who staff some of its most prominent positions surely warrants use of the term. Truly, "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). *See id.* at 447 (opinion for the Court) (striking down the line-item veto as unconstitutional because it "gives the President the unilateral power to change the text of duly enacted statutes"). The growth of government coupled with the lack of accountability for those who run it creates a clear and present danger to the constitutional structure and the liberty it guarantees.

B. The Appointments Clause does not exist to serve the Executive's sole interest or convenience.

One crux of the government's argument is that their favored construction of the FVRA should be approved because "[e]very President since the FVRA's enactment has made nominations of persons serving in an acting capacity . . . in accordance with that construction." Pet. Br. at 15. *See also* Pet. at 26 ("The court of appeals' decision is . . contrary to settled . . . practice. . . ."). In other words, the government would have this Court believe that just because everybody's doing it, it must be not only okay, but constitutional. The government also asks this Court to decide in favor of its convoluted interpretation based on what would happen at "a practical level" if additional agency actions were to be called into question. Pet. at 27.

Language again in *Freytag* speaks to this very situation: "Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interest." 501 U.S. at 880. Simply because the Executive has been acting for its purported convenience – and simply because vacancy statutes to and through the present day allow for some exercise of the appointment power temporarily in recognizing the need to keep the government running when individuals step down or cannot serve – does not mean that it

meets the requirements of the FVRA or the Appointments Clause in doing so.[4] The government fears a "significant impediment to the ability of any President . to temporarily fill important posts in the Executive Branch with the persons whom *the President* deems most qualified to *fill them permanently*." Pet. at 11 (emphasis added). *See also Buckley*, 424 U.S. at 121 ("The Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President."). But this determination is not for the President to say – it is the Senate who has the final word, and the Senate indeed was intended to pose such an impediment for the President in determining who should permanently serve.

The government's attitude flies in the face of the proper vision of the role of the Executive. For example, in striking down the President's executive order directing the Secretary of Commerce to seize major steel mills to prevent a labor shutdown during the Korean War, the Court invoked the most apropos first principles: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Steel Seizure Case*, 343 U.S. at 587. *See Clinton*, 524 U.S. at 449 (Kennedy, J., concurring) ("The Constitution's structure requires a stability which transcends

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[4] In fact, "[l]egislative action may indeed often be cumbersome, time-consuming, and apparently inefficient[,]" *Steel Seizure Case*, 343 U.S. at 629 (Douglas, J., concurring), but the Framers of the Constitution intended as much. Such inconveniences do not warrant policies that subvert the separation of powers.

the convenience of the moment."). This hearkens back to that same pesky, original concern of the concentration of more than one type of power in the same hands. When the President appoints those who execute legislative functions through regulations without a check from the legislative branch itself, the result is what Madison, Montesquieu, and this Court warned of: tyranny.

Likewise, some would interpret Hamilton's legacy in advocating for and securing a singular, energetic executive as cause for somehow eschewing the role that the Senate is meant to play in advice and consent.[5] It is well settled and uncontested that "assistants or deputies of the Chief Magistrate" certainly "derive their offices from his appointment, at least from his nomination. . . ." The Federalist No. 72, at 434 (Alexander Hamilton) (Clinton Rossiter ed., 1999). *See also Myers v. United States*, 272 U.S. 52, 117 (1926) ("[T]he President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates."). Yet this underlying truth behind the daily functions of the administrative state does not excuse a violation of separation of powers when Congress, in enacting the FVRA, allowed multiple options for filling vacancies. The Executive will not be hamstrung if the FVRA is interpreted by its plain language. The only "deleterious consequences for policymaking. ."[6]

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[5] *See generally* Br. of *Amicus Curiae* Constitutional Accountability Center.

[6] Other *Amici* also imply that the intent behind the Recess Appointments clause, U.S. Const. art. II, § 2, cl. 3, which, as this

Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. Cal. L. Rev. 913, 937 (2009), are those agency actions such as the instant case where the Executive, by its own fault for failing to follow the requirements set out in the FVRA, may potentially be held invalid. These are consequences of the Executive's own making, not of the Statute's, and cementing the proper statutory interpretation will ensure that any upheaval does not happen in the future, as it has in this case because of the Executive's faulty interpretation.

Lastly, any attempt to justify the flawed interpretation of the FVRA simply because the Senate has acquiesced to the Executive's misunderstanding and misuse should be disregarded. *See* Pet. Br. at 13-14 (internal citation omitted) ("There have been more than 100 such nominees in the 18-year history of the FVRA . . . [a]nd nominees serving on the basis of the Executive's longstanding interpretation have been routinely confirmed by the Senate."). Of course, as this Court is well aware, "[s]ince the separation of powers exists for the protection of individual liberty, its vitality 'does not

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Court knows, allows the President to fill positions while the Senate is in recess, is proper support for the government's interpretation of the FVRA. *See* Br. of *Amicus Curiae* Constitutional Accountability Center at 9. But unlike recess appointments, where without the so-named clause the President would lack substantial power, the FVRA gives multiple avenues for the President to staff positions when vacancies arise. The circuit court's proper interpretation of the Statute leaves the President with multiple, ample options, and his ability in staffing executive branch positions is not "undermined." *Id.* at 10.

depend' on 'whether the encroached-upon branch approves the encroachment.'" *Noel Canning*, 134 S. Ct. at 2593 (Scalia, J., concurring) (quoting *Free Enter. Fund*, 130 S. Ct. at 3155). If this were not the case, any longstanding constitutional principle could be worn away in one term of Congress. Surely this is also tyranny by another name.

C. To preserve the separation of powers principles provided by the Appointments Clause, this Court should affirm the lower court's decision.

The above discussion demonstrates the critical importance of this Court's role in preserving and in this case restoring the careful balance of powers among and between the branches. "[A]s to the particular divisions of power that the Constitution does in fact draw, we are without authority to alter them, and indeed we are empowered to act in particular cases to prevent any other Branch from undertaking to alter them." *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 487 (1989). *See Noel Canning*, 134 S. Ct. at 2593 (Scalia, J., concurring) (noting that "policing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital functions of this Court'") (quoting *Pub. Citizen*, 491 U.S. at 468 (Kennedy, J., concurring in the judgment)). Such an alteration is what the Executive has done affirmatively in this case,[7] but the Senate, too, in

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[7] *See Freytag*, 501 U.S. at 879-80 (rejecting the argument that the Court should defer to the Executive's view that there has been

failing to act also passively undermined this division of power. Indeed, *Amicus* asks this Court to decide this pivotal separation of powers case in light of its importance to our constitutional structure and the preservation of liberty.

In keeping with this Court's direction for "high walls and clear distinctions" to preserve the separation of powers, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995), Congress enacted the FVRA, which sets forth easily applied, bright-line rules. The purpose of the separation of powers is "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Steel Seizure Case*, 343 U.S. at 613-14 (quoting *Myers*, 272 U.S. at 240, 293). As Justice Jackson stressed, any presidential claim to power "at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 638 (Jackson, J., concurring). It is in this scrutiny that this Court is well suited and handily equipped to exercise its most essential calling. Preserving the separation of powers is the ultimate role of this Court.

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no encroachment of the separation of powers in an Appointments Clause challenge).

II. Appointees serving in violation of the FVRA have access to shocking amounts of power and control with no check on uses of that power.

The individuals listed in the government's detailed table, Pet. Br. App. A, have access to and exercise far-reaching powers over not only the operation of the federal government, but also the military, foreign policy, and even entire sectors of the economy. Their appointments to these posts in violation of the FVRA are not symptoms of only one political party or agenda; Presidents Clinton, Bush, and Obama have all kept appointees in their posts after they became ineligible to serve upon their nomination. *See generally* Pet. Br. App. A.

The FVRA goes one step beyond the constitutional baseline of the Senate's advice and consent role because it accounts for the danger of allowing a political appointee to become the perpetual nominee, continuing to serve during the often lengthy nomination process (and after it even though the Senate has expressed its disapproval of the nominee with a return of the nomination to the President). In fact, in the instant case, the President was so bold as to nominate the same individual not once,[8] but twice, and then keep

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[8] Congress.gov Nominations, https://www.congress.gov/nomination/112th-congress/86?q=%7B%22search%22%3A%5B%22Lafe+Solomon%22%5D%7D&resultIndex=2 (last visited Sept. 20, 2016).

that individual in place despite the fact that the Senate rejected the nomination on both occasions.[9] The continued service of any appointee in this situation completely nullifies the Senate's clearly articulated role in the confirmation of appointees through advice and consent.

Though the instant case may present one of the most egregious examples, its value goes beyond demonstrating the particular harms to Respondent in this case. It serves to bring attention to other, similarly situated current and previous acting appointees and the amounts of power and discretion they have previously controlled and currently control.

A. Appointees who have served and are serving in violation of the FVRA exercise prosecutorial discretion.

The Attorney General is the chief prosecutor of the United States Government. 28 U.S.C. § 503. In that role, the Attorney General not only brings criminal and civil claims against those who have violated federal law, but also advises the President, 28 U.S.C. § 511, advises the heads of executive departments, 28 U.S.C. § 512, and advises secretaries of the different branches of the military. 28 U.S.C. § 513.

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[9] In the second instance, the President withdrew the nomination after months of inaction by the Senate. *See* Congress.gov Nominations, https://www.congress.gov/nomination/113th-congress/506?q=%7B%22search%22%3A%5B%22Lafe+Solomon%22%5D%7D&resultIndex=1 (last visited Sept. 20, 2016).

The Attorney General serves with the advice and consent of the Senate. Thankfully, no Attorney General has served in violation of the FVRA. However, since 1998, twenty-one high-ranking prosecutors in the Department of Justice have served or are currently serving in violation of the FVRA. *See generally* Pet. Br. App. A. These appointees include eleven Assistant Attorneys General, three Associate Attorneys General, and three Deputy Attorneys General, along with other directors of various departments of the Justice Department. *Id.*

The fact that Deputy Attorneys General have served and currently serve in violation of the FVRA is especially troubling. This position is the second-in-command to the Attorney General.[10] In fact, in the day-to-day operations of the Department of Justice, the Deputy Attorney General steers many important decisions and influences the Attorney General. Some of the duties of the Deputy include but are not limited to the following: authorize searches and electronic surveillance, review and recommend on whether the Attorney General should seek the death penalty in appropriate cases, recommend pardons and commutations to the White House, and exercise all powers granted to the Attorney General unless explicitly stated that the power is to be reserved to the Attorney General solely. Organization, Mission & Functions Manual, *supra* note 10.

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[10] Organization, Mission & Functions Manual: Attorney General, Deputy and Associate, https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general (last visited Sept. 20, 2016).

Therefore, the Deputy Attorney General has a vast amount of prosecutorial discretion, and controls the fate of whether some individuals will live or die. It is no wonder that this position, when established, called for the advice and consent of the Senate in confirming the individual who would serve. 28 U.S.C. § 504. Regardless of choices made by individuals serving in violation of the FVRA, simply the access to such power and potential for abuse is damning enough. It is the job of the law to ask, "what if?" Regarding prosecutors, "what if" means that the lives of defendants hang in the balance. When appointees serve in a manner that side-steps the system of checks and balances, there is no political accountability to either the Executive or the Legislature. As demonstrated by the instant case, even though the Senate twice rejected Mr. Solomon's nomination,[11] the President allowed Mr. Solomon to remain at his post; the government now claims a skewed interpretation of the FVRA to support that action. What more was the Senate to do? Surely they cannot be held politically accountable, but the President seeks to eschew accountability as well. It is clear that the responsibilities, though extensive, of Mr. Solomon pale in comparison to those of a Deputy Attorney General, who has the power to recommend (if not decide) whether individuals should live or die. The potential for abuse is grave, and this Court should act to protect the balance of power.

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[11] Congress.gov Nominations, https://www.congress.gov/nomination/113th-congress/506?q=%7B%22search%22%3A%5B%22Lafe+Solomon%22%5D%7D&resultIndex=1 (last visited Sept. 20, 2016).

Even those in posts junior to the Deputy Attorney General bear immense amounts of prosecutorial discretion. The case of one Assistant Attorney General is especially insightful. In 2008, Matthew Friedrich was appointed acting Assistant Attorney General for the criminal division. Pet. Br. App. A at 54a. Under Friedrich's tenure and leadership, Senator Ted Stevens was prosecuted for felony ethics charges and convicted.[12] However, in what has been referred to as a "shocking and disturbing" case of prosecutorial misconduct,[13] the Senator was acquitted after it was discovered that the attorneys directly under Friedrich, one of whom was specifically placed on the case by him, worked with witnesses whom the attorneys knew falsified testimony. Wilbur, *supra* note 13. Friedrich was deeply involved with the trial.[14] *See generally In re Special Proceedings*, 842 F. Supp. 2d 232 (D.D.C. 2012). Critics have claimed he bore a great deal of responsibility in the proceedings.[15]

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[12] Del Quentin Wilber, *Stevens Found Guilty on 7 Counts*, Washington Post, Oct. 28, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/10/27/AR2008102700289.html.

[13] Del Quentin Wilbur, *Judge Orders Probe of Attorneys in Stevens Case*, Washington Post, April 8, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/04/07/AR2009040700338.html.

[14] *Justice for Ted Stevens*, The Wall Street Journal, Feb. 20, 2009, http://www.wsj.com/articles/SB123509358392428915; NPR, *Report: Prosecutors Hid Evidence In Ted Stevens Case*, March 15, 2012, http://www.npr.org/2012/03/15/148687717/report-prosecutors-hid-evidence-in-ted-stevens-case.

[15] Erin Fuchs, *The Tragic Story Of A Lawyer Who Killed Himself After A Botched Prosecution*, Business Insider, May 19, 2014, http://www.businessinsider.com/sidney-powell-on-nicholas-marsh-and-ted-stevens-2014-5.

Even though Friedrich was never held accountable, the damage was already done to Senator Stevens, who lost his reelection bid.[16] Is it any wonder, then, that the Senate refused to confirm Friedrich to his post?[17] Even if an acting official is not directly responsible for the life or death of an individual, in this case, Friedrich was responsible for the livelihood and eventual disgrace of one of the nation's longest serving and most decorated senators. The powers held by attorneys general at every level in the Department of Justice cannot be overstated. Especially at a time when "overcriminalization" and questions regarding the power granted to prosecutors[18] are at the forefront of the criminal justice reform movement, the Senate's advice and consent role in approving the nation's top prosecutors is more critical than ever.

B. Appointees who have served and are serving in violation of the FVRA are responsible for national defense and shape foreign policy.

Since 1998, at least twenty-one high-ranking officials throughout the military, Department of Defense,

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[16] Paul Kane, *Sen. Ted Stevens Loses Reelection Bid*, Washington Post, Nov. 19, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/11/18/AR2008111803227.html.

[17] Congress.gov Nominations, https://www.congress.gov/nomination/110th-congress/2205?q=%7B%22search%22%3A%5B%22Matthew+Friedrich%3A%22%5D%7D&resultIndex=1 (last visited Sept. 20, 2016).

[18] *See generally, e.g.*, *Pottawattamie Cty. v. McGhee*, 558 U.S. 1103 (2010) (dismissed pursuant to Sup. Ct. R. 46); *Yates v. United States*, 135 S. Ct. 1074 (2015).

Department of State, and related sub-agencies and departments have served in violation of the FVRA. *See generally* Pet. Br. App. A. Individuals in these positions not only exercise great amounts of authority over the protection of our nation, but they also have access to top secret information.

For instance, the Deputy Director of the Central Intelligence Agency[19] assists the Director in carrying out the duties and responsibilities of that office. 50 U.S.C. § 3037(a). However, the Deputy Director is automatically selected as the acting Director if for any reason the Director is unable to serve. 50 U.S.C. § 3037(b). Therefore, this second in command post has immense power. The Director's powers include: a blanket ability to collect, correlate, evaluate, and disseminate "intelligence" generally – a blanket grant of power, 50 U.S.C. § 3036(d)(1)-(2); control the United States' undercover operations around the world, 50 U.S.C. § 3036(d)(3); terminate, at his discretion, *any* officer or employee of the CIA, 50 U.S.C. § 3036(e); and finally, "coordinate the relationships between the intelligence community and . . . foreign governments or international organizations on all matters involving intelligence related to the national security or involving intelligence acquired through clandestine means." 50 U.S.C. § 3036(f). Clearly, the powers granted to the Director of the CIA are at least extensive, and the Deputy Director may assist in any of these matters. A person with so much power, especially when exercises of

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[19] *See* Pet. Br. App. A at 7a, record of John McLaughlin's service as Acting Deputy Director of Central Intelligence.

such power are often out of view of the media and the public, must be carefully selected and insulated from political whims. Without Senate advice and consent, this cannot otherwise be ensured.

Another instance of a position with unfettered access to highly classified information is that of the Inspector General of the Department of Defense.[20] Since the FVRA was passed, five inspectors general in various departments have served in violation of it. *See generally* Pet. Br. App. A. The general powers of Inspectors General do bear mention briefly. Inspectors General have the power to audit within their own offices, 5 U.S.C. § 4(a)(1), as well as the ability to advise on legislation and regulations and department policies generally. 5 U.S.C. § 4(a)(2)-(3). But Inspectors General also have the power to recommend prosecution to the Attorney General, 5 U.S.C. § 4(d), in what could be called diluted prosecutorial discretion, and in gathering the information needed to make such a recommendation, have almost unfettered power to investigate. 5 U.S.C. § 6(a).

This great power is an excellent tool when an Inspector General can be a check on the department or administrative agency in question, and when the Inspector General has an appropriate check placed on her; that is, the confirmation process required by the statute. 5 U.S.C. § 3. However, when the Inspector General is unchecked, she has the power to upend the

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[20] *See* Pet. Br. App. A at 56a, record of Gordon S. Heddell's service as Acting Inspector General, Department of Defense.

entire office under her inspection by: unfettered access to all "material available to the applicable establishment. . . ." 5 U.S.C. § 6(a)(1); to make any investigation deemed by the Inspector General as "necessary or desirable," 5 U.S.C. § 6(a)(2); and in sum, have the ability to appoint an entire investigative staff and obtain any information from any individual in the appropriate department. 5 U.S.C. § 6(a)(4)-(7).

Arguably the most powerful Inspector General of all is that of the Department of Defense, if solely because of the sensitive information to which access is required to engage in the investigations required of the office. Congress has in fact recognized this concern, and accordingly, enacted 5 U.S.C. § 8, which limits the abilities of the Inspector General of the Department of Defense. Congress gave the Secretary of Defense the power to limit the Inspector General's access to any information of which the disclosure would constitute a "serious threat to national security." 5 U.S.C. § 8(b)(1). However, upon further thought, this check is not much of a safeguard. No Secretary of Defense has served in violation of the FVRA. However, as is the case with other departments, Deputy Secretaries have served in violation of the FVRA. *See generally* Pet. Br. App. A. And as is the case with other Deputies, the Deputy Secretary of Defense is second in command to the cabinet post and exercises duties as proscribed by the Secretary. 10 U.S.C. § 132(b)-(d). Accordingly, an Inspector General serving in violation of the FVRA may well be accountable to a Deputy Secretary serving in violation of the FVRA. The Senate's important check over an

entire cabinet department is substantially minimized, and the exercise of power is unencumbered when the FVRA is violated.

C. Appointees who have served and are serving in violation of the FVRA are responsible for diverse areas of domestic policy and exercise control over entire sectors of the economy.

Individuals who have previously served and are currently serving in violation of the FVRA implement the Executive's agenda in many diverse ways. Not dissimilar from the examples above, a dozen Deputy Secretaries of entire cabinet departments have served improperly. They range from the Deputy Secretary of Energy to the Deputy Secretary of Education to the Deputy Secretary of Labor to the Deputy Secretary of Health and Human Services to the Deputy Secretary of Commerce; the list goes on. *See generally* Pet. Br. App. A. Appointees have even included the President of the Export-Import Bank, the Commissioner of the Food and Drug Administration, the Administrator of the National Highway Traffic Safety Administration, and multiple top-level administrators in the Environmental Protection Agency (EPA). *Id.*

One seemingly innocuous example of a position filled improperly under the FVRA is the Assistant Secretary of the Department of Housing and Urban Development (HUD), Federal Housing Administration

(FHA) Commissioner (a singular role).[21] In this position, Carol J. Galante "had direct responsibility for oversight and administration of the FHA's trillion dollar insurance portfolio, which includes single family and multifamily housing. . . "[22] According to the Legislature's records, she was nominated in October of 2011 and confirmed in December of 2012.[23] Therefore, she served for over a year during "the worst financial crisis since the Great Depression . . . [,]" Carol Galante Biography, without any check by the Senate in violation of the FVRA. In fact, while she was at the helm, the FHA requested and required financial assistance for the first time in its 79-year history to the tune of $1.7 billion taxpayer dollars.[24] Additionally, the FHA "doesn't have to ask Congress for money because it has what is known as 'permanent and indefinite' budget authority, allowing it to tap the Treasury."[25] Therefore, the singular power over an entire sector of the economy fell into

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[21] *See* Pet. Br. App. A at 62a, record of Carol J. Galante's service as Acting Assistant Secretary of Housing and Urban Development (Federal Housing Commissioner).

[22] Carol Galante Biography, UC Berkeley Faculty Directory, http://ced.berkeley.edu/ced/faculty-staff/carol-galante (last visited Sept. 20, 2016).

[23] Congress.gov Nominations, https://www.congress.gov/nomination/112th-congress/1064?q=%7B%22search%22%3A%5B%22Carol+J.+Galante%22%5D%7D&resultIndex=1 (last visited Sept. 20, 2016).

[24] Joe Light, *Top Obama Housing Official Carol Galante to Step Down*, The Wall Street Journal, Aug. 11, 2014, http://www.wsj.com/articles/SB10001424052702304526204579101142224548428.

[25] Nick Timiraos, *FHA Will Require $1.7 Billion From Treasury*, The Wall Street Journal, Sept. 27, 2013, http://www.wsj.com/articles/SB10001424052702304526204579101142224548428.

the hands of one individual who served for over a year with no check from the Senate. The decisionmaking power and authority exercised by any person in this position should never be unchecked, especially given the unrestricted access to Treasury coffers. However, as the housing market, including federal lending, stumbled out of the recession on the backs of taxpayers, the person in control was not at all accountable to the democratic process.

Similarly, one role that seems perfectly routine at first blush is that of the Director of the Office of Personnel Management (OPM).[26] However, the federal government is "the Nation's largest employer,"[27] and the Director of the OPM is at the helm of the government's human resources department. Pursuant to 5 U.S.C. § 1103(c)(2), the Director promulgates regulations to control the hiring and firing throughout the federal government. Again, serving with no Senate check in violation of the FVRA, the Director of the OPM is just one of many examples wherein one person has control over a vast sector of the economy.

Perhaps the most damning powers exercised, however, are the powers to regulate. Individuals serving in violation of the FVRA are often proscribed by statute the power to craft regulations, and arguably those

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[26] *See* Pet. Br. App. A at 57a, record of Michael W. Hager's service as Acting Director of OPM; *see* Pet. Br. App. A at 81a, record of Beth F. Cobert's service as Acting Director of OPM.

[27] Federal Employers, United States Department of Labor, https://www.dol.gov/odep/topics/federalemployment.htm (last visited Sept. 20, 2016).

regulations promulgated by the EPA affect the most Americans every single day. The EPA's power to regulate and enforce its regulations is wide-reaching.[28] The Deputy Administrator of the EPA is the second in command in the agency's structure.[29] As this Court is well aware, the EPA's regulations are frequently a topic of litigation in courts around the country, including this Court. *See, e.g., Util. Air Regulation Grp.*, 134 S. Ct. 2427 (2014) (finding the EPA's greenhouse gas regulations unconstitutional); *Rapanos v. United States*, 547 U.S. 715, 725 (2006) (plurality opinion) (rejecting the EPA's expansive definition of Waters of the United States). The constitutionality of many EPA actions are at best murky, and as the agency debuted its new regulations surrounding the Waters of the United States interpretations of the Clean Water Rule, the issues of unregulated authority are again at the forefront as the Sixth Circuit stayed enforcement of the new rule. *Ohio v. United States Army Corps of Eng'rs*, 803 F.3d 804 (6th Cir. 2015) (ordering a stay of the implementation of the EPA's new regulations redefining Waters of the United States). Not only do these regulations risk running aground of constitutional authority, but high-level

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[28] *See* Reorganization Plan No. 3 of 1970, 84 Stat. 2086-89, https://www.gpo.gov/fdsys/pkg/STATUTE-84/pdf/STATUTE-84-Pg2086.pdf (last visited Sept. 20, 2016).

[29] *See* Pet. Br. App. A at 74a, record of Albert Stanley Meiburg's service as Acting Deputy Administrator of the EPA; *see generally* About the Office of the Administrator, U.S. Environmental Protection Agency, https://www.epa.gov/aboutepa/about-office-administrator (last visited Sept. 20, 2016).

actors promulgating and implementing these regulations serve unconstitutionally as it is. Again, with no political accountability, the power to regulate and enforce through judicial actions against U.S. citizens and residents is a dangerous power, and as the EPA continues its fight to expand its regulatory sphere through the promulgation of the new, troubled Clean Water Rule, the Senate's check on those individuals appointed to positions of great power and leadership within the EPA is more important than ever.

In sum, the doctrine of separation of powers is the antithesis of serving any one branch's interest. Power is easy to accumulate; throughout this Court's jurisprudence, it is limiting the accumulation of power that has proven far more difficult. In the instant case, Congress has already erected clear boundaries in the FVRA on what the Executive may and may not do; the statutory language is clear and unambiguous. The lack of enforcement of those boundaries does not make them any less existent, valid, or pointedly relevant as Executive power continues its exponential growth in the modern administrative state.

CONCLUSION

For the reasons stated in the Respondent's Brief and this *amicus* brief, this Court should affirm the

decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SW GENERAL, INC.,
D/B/A SOUTHWEST AMBULANCE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. § 3345 *et seq.*, provides that when a presidentially appointed government post requiring Senate confirmation [PAS] becomes vacant, certain individuals may temporarily perform the duties of that post in an acting capacity.

Section 3345(a)(1) of the FVRA, which establishes the default rule for filling such vacancies, provides that "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." Alternatively, the President may designate either "a person who serves in [another PAS post]" under § 3345(a)(2) or a Government employee who has worked for at least 90 days at a pay rate of GS-15 or higher under § 3345(a)(3) to temporarily perform the duties of that post in an acting capacity.

Section 3345(b)(1) further limits the circumstances under which a person may continue to serve as the acting officer for a vacant office after being nominated by the President to the permanent position, providing that such "a person may not serve as an acting officer for an office under this section" unless that person served as first assistant to the vacant office for at least 90 days in the year preceding the vacancy.

The question presented is whether the limitation for permanent nominees under § 3345(b)(1) applies to all temporary officers serving under § 3345(a), or whether it applies only to first assistants who take office under § 3345(a)(1).

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29 C.F.R. § 102.15 3

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Antonin Scalia & Bryan A. Garner, *Reading the Law: The Interpretation of Legal Texts* (2012) 13

Black's Law Dictionary (10th ed. 2014) 10, 12

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Letter from Carlotta C. Joyner, Director, Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R (Feb. 23, 2001)..... 18

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INTERESTS OF *AMICI CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF frequently participates in original and amicus litigation to prevent the accumulation of power in any one governmental branch in violation of the Constitution's careful separation of powers. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179 (9th Cir. 2016), *reh'g denied*, July 20, 2016.

Allied Educational Foundation (AEF) is a nonprofit charitable foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici believe that the Senate's advice-and-consent function provides a vital check on runaway

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and letters of consent are on file with the Clerk.

executive overreach in our constitutional system. After many years of such overreach, Congress sought to preserve the Senate's important advice-and-consent prerogative by enacting the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. § 3345 *et seq.*, which prevents the President from permanently installing his chosen replacements as "acting officers" without Senate approval.

Nonetheless, in this case the Government urges an interpretation of the FVRA that would allow the President to advance his agenda without first submitting to important constitutional prerequisites. *Amici* fear that if the President is permitted to install his chosen officers in high-level government positions without obtaining the Senate's advice and consent, it will dramatically expand the executive power—at the expense of the Constitution's carefully calibrated checks and balances—by resurrecting the very problem that Congress sought to remedy when it enacted the FVRA.

STATEMENT OF THE CASE

Although the Appointments Clause requires important government posts to be filled only by persons who are nominated by the President "by and with the Advice and Consent of the Senate," U.S. Const. art. II, § 2, Presidents from both political parties circumvented that requirement for decades by filling vacancies for such posts with replacements who would serve indefinitely in an acting capacity. To prevent the President from installing his chosen replacement without Senate approval, Congress enacted the FVRA, which provides that when a

presidentially appointed government post requiring Senate confirmation [PAS] becomes vacant, only certain individuals may temporarily perform the duties of that post in an acting capacity.

Section 3345(a)(1) of the FVRA, which establishes the default rule for filling such vacancies, provides that "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." Alternatively, the President may designate either "a person who serves in [another PAS post]" under § 3345(a)(2) or a Government employee who has worked for at least 90 days at a pay rate of GS-15 or higher under § 3345(a)(3) to temporarily perform the duties of that post in an acting capacity Section 3345(b)(1) further limits the circumstances under which a person may continue to serve as the acting officer for a vacant office after being nominated by the President to the permanent position, providing that such "a person may not serve as an acting officer for an office under this section" unless that person served as first assistant to the vacant office for at least 90 days in the year preceding the vacancy.

Under the National Labor Relations Act (NLRA), 29 U.S.C. § 153(d), the General Counsel of the National Labor Relations Board (NLRB) must be appointed by the President with the advice and consent of the Senate. Because the NLRB cannot adjudicate an unfair labor practice dispute until the General Counsel decides to issue a complaint, the General Counsel has "final authority" to prosecute unfair labor practices under the NLRA. *See* 29 U.S.C. §§ 153(d), 160(b); 29 C.F.R. §§ 102.9, 102.15.

Following Ronald Meisburg's resignation as NLRB's General Counsel in June 2010, the President directed Lafe Solomon to serve as Acting General Counsel pursuant to § 3345(a) of the FVRA. Although at that time Solomon had worked for at least 90 days at a pay rate of GS-15 or higher as required under § 3345(a)(3), he was not—nor had he ever been—the first assistant to the General Counsel. Nonetheless, on January 5, 2011, the President nominated Solomon to serve permanently as the NLRB's General Counsel. *See* Pet. App. 6. Because the Senate never acted on that nomination, it was returned to the President. *Id.* at 6a (citing 159 Cong. Rec. S17 (daily ed. Jan. 3, 2013)). Solomon served as the NLRB's Acting General Counsel from June 21, 2010, to November 4, 2013.

In January 2013, the NLRB issued an unfair labor practices complaint against Respondent SW General, Inc., an Arizona ambulance company. *See* Pet. App. 7a. Following a hearing, an administrative law judge (ALJ) concluded that Respondent violated the NLRA by discontinuing annual bonuses for certain longstanding employees—even though the collective-bargaining agreement requiring such bonuses had since expired. *Id.* at 104a. Contesting the ALJ's legal and factual findings, Respondent filed fifteen exceptions to the ALJ's decision, one of which contended that because Solomon was serving as Acting General Counsel in violation of the FVRA, the NLRB's complaint was invalid. *Id.* at 7a. Failing even to address the merits of Respondent's FVRA challenge, the NLRB adopted the ALJ's order. *Id.* at 31a-371.

On appeal, a unanimous panel of the D.C. Circuit vacated the NLRB's order. *See* Pet. App. 1a-30a. Judge Henderson (joined by Judges Srinivasan and Wilkins) held that because "Solomon was serving in violation of the FVRA when the complaint issued," the NLRB's proceeding against Respondent was *ultra vires*. Pet. App. 8a. Relying on the FVRA's text, structure, and purpose, the appeals court explained that under § 3345(b)(1), an acting officer cannot be named a permanent nominee unless "(1) he served as the first assistant to the office in question for at least 90 of the last 365 days or (2) he was confirmed by the Senate to be the first assistant." *Id.* at 11a (citing §§ 3345(b)(1)-(2)). Clarifying that § 3345(b)(1)'s limitation applies to "all acting officers," the panel concluded that "[b]ecause Solomon was never a first assistant and the President nominated him to be General Counsel on January 5, 2011, the FVRA prohibited him from serving as Acting General Counsel from that date forward." *Id.* at 20a. Consequently. the appeals court dismissed the complaint and vacated the NLRB's order. *Id.* at 30a.

The panel rejected the Government's contention that § 3345(b)(1)'s limitations apply only to first assistants who become acting officers under § 3345(a)(1). Under the Government's urged construction, § 3345(b)(1)'s introductory phrase "[n]otwithstanding subsection (a)(1)" does not impose further limits on *all* acting officers, but merely limits first assistants serving under § 3345(a)(1). *See* Pet. App. 13a. Concluding that the ordinary meaning of the word "notwithstanding" is "in spite of" rather than "for purposes of," the appeals court held that

the "notwithstanding clause" does not restrict "the ultimate scope of subsection (b)(1)." *Id.* at 14a.

The Government's petition for rehearing en banc was denied by a vote of 7-3. *See* Pet. App. 114a.

SUMMARY OF ARGUMENT

Seeking to arrest a bipartisan trend whereby Presidents would evade the Senate's advice-and-consent role by appointing acting officers who would serve permanently without Senate approval, Congress enacted the FVRA. Section 3345(b)(1) of the FVRA provides that "a person" nominated for a vacant PAS post "may not serve as an acting officer under this section" unless he has served as "first assistant" to that vacant post for at least 90 days. At bottom, this case presents a straightforward question of statutory interpretation: whether the words used in § 3345(b)(1) should be given their ordinary, common meaning, or whether they should be construed—*only* in that subsection—to have the sui generis meaning ascribed to them by the Government.

The appeals court correctly held that § 3345(b)(1)'s meaning is "clear." That is, subsection (b)(1)'s requirements apply to *all* "persons" serving as acting officers under § 3345. Had Congress desired to limit § 3345(b)(1)'s requirement solely to first assistants—as the Government contends here—it could have easily used the more specific term "first assistant" instead of "person." Instead, Congress's deliberate use of the broad and inclusive term "*a person*" clarifies that § 3345(b)(1) refers to the entire universe of possible candidates for acting officer.

Likewise, by clarifying that § 3345(b)(1)'s limitation applies to any acting officer "under this section," Congress expressly sought to limit *all* acting officers contemplated under § 3345, not merely those (*i.e.*, first assistants) authorized under subsection (a)(1).

Despite such clear language, the Government claims that § 3345(b)(1)'s broadly drafted limitation applies only to first assistants. Unsurprisingly, that self-serving interpretation significantly expands the pool of nominees who can begin work immediately as acting officers—*without* first obtaining the advice and consent of the Senate. Focusing on § 3345(b)(1)'s introductory clause—"notwithstanding subsection (a)(1)"—the Government contends that "notwithstanding" means "for purposes of," so that subsection (b)(1)'s requirements apply *only* to first assistants under subsection (a)(1).

But that conclusion does not follow from the natural, ordinary meaning of the word "notwithstanding," which means "despite" or "in spite of." The Government offers no authority for its own idiosyncratic reading, and none is available. Moreover, the word "notwithstanding" appears five times throughout § 3345, yet the Government urges its atextual meaning *only* in subsection (b)(1). The Government's construction also ignores the fact that subsection (a)(1) is the *only* provision that operates automatically, whereas subsections (a)(2) and (a)(3) do not. Thus, simply because subsection (b)(1) supersedes the automatic default provision of subsection (a)(1) does not mean that its scope is limited to that subsection.

Finally, even if the Court concludes that

§ 3345(b)(1) is ambiguous as to its proper scope, the Government's interpretation is not entitled to deference. Seeking to bolster its "longstanding" interpretation of subsection (b)(1), the Government relies on an OLC guidance document and a letter from the GAO. But because neither of those agencies is charged with administering the FVRA, binding deference under *Chevron* is simply unavailable. Regardless, even if otherwise authoritative, informal statements such as guidance documents and letters do not qualify for *Chevron* deference. And given the greater separation-of-powers concerns that gave rise to the FVRA in the first place, deference to *any* Executive Branch interpretation is entirely unwarranted.

ARGUMENT

I. THE DECISION BELOW IS CONSISTENT WITH THE PLAIN LANGUAGE AND STATUTORY STRUCTURE OF THE FVRA

Section 3345(b)(1) of the FVRA imposes limits on who can continue to serve as acting officer after being nominated to the permanent position, precluding from such service any "person" who did not serve as "first assistant" for at least 90 days. *See* 5 U.S.C. § 3345(b)(1). The Government contends, however, that § 3345(b)(1)'s limitations apply only to first assistants who became acting officers under § 3345(a)(1). *See* Pet. Br. at 26 ("Subsection (b)(1) of Section 3345 sets forth limits applicable only to first assistants who are serving pursuant to subsection (a)(1)—and not to PAS officials serving pursuant to subsection (a)(3)."). But, as every court to consider the question has concluded, that reading ignores not

only the plain meaning of the words Congress chose in crafting the statute, but it also ignores the context of those words in the overall statutory structure of the FVRA. This Court's principles of statutory construction do not support the Government's reading.

A. The Plain, Ordinary Meaning of § 3345(b)(1)'s Text Confirms that It Applies to *All* Acting Officers

Inquiries into the meaning of a statute must begin with the statutory language itself. This Court has "stated time and time again that courts must presume that [Congress] says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (quoting *Rubin v. United States*, 449 U.S. 424 (1981)). Moreover, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [this Court's] precedents and that it expects its enactments to be interpreted in conformity with them." *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995). Here, as the panel below unanimously concluded, the FVRA's language in § 3345(b)(1) is "clear." Pet. App. 18a.

As § 3345(a)(1) provides, when a vacancy occurs for a PAS post, "the first assistant to the office" automatically fills the vacancy as an acting officer—unless the President appoints someone else as acting officer under subsections (a)(2) or (a)(3). Regardless of who fills the vacancy as an acting

officer under § 3345(a)(1)-(3), § 3345(b)(1) then imposes further restrictions on which acting officers the President may nominate for permanent appointment. Under subsection (b)(1), "*a person* may not serve as acting officer for an office *under this section*" unless he also served as "first assistant" for at least 90 days during the prior year. 5 U.S.C. § 3345(b)(1) (emphasis added).

In construing the FVRA, the words of the statute are paramount, and those words must be given their ordinary, everyday meaning. *See, e.g.*, *United States v. Ressam*, 553 U.S. 272, 274 (2008) (relying on the "most natural reading of the relevant statutory text"); *Watson v. United States*, 552 U.S. 74, 83 (2007) (applying the "ordinary meaning and the conventions of English"); *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006) (looking to the "everyday" or "regular usage" in keeping with the "commonsense conception" of the term); *Smith v. United States*, 508 U.S. 223, 228 (1993) (consulting the "ordinary or natural meaning" and "everyday meaning").

Here, Congress's deliberate use of the broad and inclusive term "*a person*" clarifies that § 3345(b)(1) refers to the entire universe of possible candidates for acting officer, *i.e.*, all such persons contemplated under subsections (a)(1), (a)(2), and (a)(3). *See, e.g.*, *Gale v. First Franklin Loan Servs.*, 701 F.3d 1240, 1246 (9th Cir. 2012) (explaining that "a" has a "generalizing force" similar to "any"); Black's Law Dictionary (10th ed. 2014) (defining a "person" as "a human being"). As this Court has recognized, "the phrase 'any person'" has a "naturally broad and inclusive meaning." *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 312 (1978). Surely if

Congress had intended § 3345(b)(1) to limit only first assistants who become acting officers under subsection (a)(1), it would have straightforwardly used "first assistant" rather than "a person."

Section 3345(b)(1) further provides that such a person "may not serve as acting officer for an office *under this section*," unless he also served as first assistant for at least 90 days in the preceding year. By clarifying that subsection (b)(1)'s limitation applies to any acting officer "under this section," Congress expressly sought to limit *all* acting officers contemplated under § 3345, not merely those authorized under subsection (a)(1). The Government's urged construction thus runs afoul of the "cardinal principle" of interpretation that courts "must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). Again, if Congress had intended § 3345(b)(1) to limit only acting officers under subsection (a)(1), it would have used "subsection (a)(1)" instead of "this section."

Despite the clear, straightforward language Congress used when establishing the scope of subsection (b)(1), the Government asks this Court to read into the statute a highly idiosyncratic meaning that the statute's text simply cannot bear. Specifically, the Government contends that the dependent phrase "[n]otwithstanding subsection (a)(1)" at the beginning of subsection (b)(1) somehow operates to narrow (b)(1)'s scope to *only* those first assistants who become acting officers under (a)(1). *See* Pet. Br. at 28. But that conclusion simply does not follow from the ordinary or natural meaning of the word "notwithstanding." The Government cites

no authority for its unusual reading, and none is available.

Again, it is a fundamental canon of statutory construction that, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014). The word "notwithstanding" means "despite" or "in spite of." *See, e.g.*, Black's Law Dictionary (10th ed. 2014); Merriam-Webster's Collegiate Dictionary (11th ed. 2003) (defining "notwithstanding" as "without being prevented by"). So the plain meaning of "notwithstanding" as used in § 3345(b)(1) means "despite subsection (a)(1)" or "in spite of subsection (a)(1)." In contrast, under the Government's highly unorthodox reading, "notwithstanding" means "with respect to" or "for purposes of." Neither of those meanings is ordinary, contemporary, or common.

Because the first-assistant default provided in § 3345(a)(1) operates automatically, Congress used the word "notwithstanding" to ensure that (a)(1)'s default provision would not escape (b)(1)'s limit on a person's ability to serve as both the acting officer and the permanent nominee for the same vacant position. As this Court has previously recognized, "the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of *any* other section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). Thus, even if the first assistant is automatically elevated to acting officer under (a)(1), he cannot escape the limitation under (b)(1) that, in order to be eligible as the President's permanent nominee, he still must have

served as first assistant for at least 90 days in the preceding year.

But simply because (b)(1) supersedes the automatic-default provision of (a)(1) does *not* mean that it supersedes *only* (a)(1) (rather than any and all contrary provisions). *See, e.g.*, *United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007) (en banc) (explaining that "statutory 'notwithstanding' clauses" work to "sweep aside potentially conflicting laws"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 127 (2012) ("[N]otwithstanding is a fail-safe way of ensuring that the clause it introduces will *absolutely, positively* prevail."). Indeed, as this Court has cogently explained in construing a similar provision in another statute: "The introductory clause ['Notwithstanding any other provision of law'] does not define the scope of [the statute]. It simply informs that once the scope of the [statute] is determined, [it applies] regardless of what any *other* provision or source of law might say." *Kucana v. Holder*, 558 U.S. 233, 238-39 n.1 (2010).[2]

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[2] The Government claims that if Congress had desired for § 3345(b)(1) to apply to all acting officers under the FVRA, it could have "provided that the limitation applies 'notwithstanding subsections (a)(1), (a)(2), and (a)(3).'" Pet. Br. at 28. But that argument improperly discounts the fact that subsection (a)(1) is the *only* provision that operates automatically, whereas subsections (a)(2) and (a)(3) do not. As the Ninth Circuit explained, "[w]ithout the 'notwithstanding' clause, confusion could easily arise as to whether (b)(1) has any force in light of the fact that the default rule exists." *Hooks v. Kitsap*, 816 F 3d 550, 560 (9th Cir. 2016).

In sum, because any other construction would require contorting the plain, ordinary meaning of the statutory text, the Court should affirm the panel's holding that § 3345(b)(1) applies to *all* acting officers under the FVRA.

B. The FVRA's Structure and Overall Scheme Confirm that § 3345(b)(1) Applies to *All* Acting Officers

As this Court has reiterated, the "ordinary meaning" of words depends on both text and context. *Sandifer*, 134 S. Ct. at 877 ("Nothing in the text or context of § 203(o) suggests anything other than the ordinary meaning of 'clothes.'"). It is therefore "a fundamental canon of statutory construction ... that the words of a statute must be read ... with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Here, the "overall statutory scheme" reinforces what the statute's plain language makes clear: that § 3345(b)(1) applies to *all* acting officers under the FVRA.

As explained previously, by clarifying that § 3345(b)(1)'s limitation applies to any acting officer "under this *section*," Congress expressly sought to limit *all* acting officers contemplated under the entirety of *section* 3345, not merely first assistants under subsection (a)(1). The overall context of § 3345 bolsters this conclusion, revealing that where Congress meant for a limitation to apply only to a particular subsection, it said so explicitly Thus, throughout § 3345, Congress deliberately used the terms "subsection," "paragraph," or "subparagraph" when referring to provisions smaller than an entire

section. *See, e.g.*, 5 U.S.C. § 3345(a)(3)(B) (referring to "subparagraph (A)"); *id.* § 3345(b)(2) (referring to "Paragraph 1"); *id.* § 3345(b)(2)(A) (referring to "subsection (a)"); *id.* § 3345(c)(1) (referring to "subsection (a)(1)"). "Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012).

Likewise, § 3345's structure further confirms that the term "*person*" in § 3345(b)(1) should be given its ordinarily broad and inclusive meaning. For example, the same term also appears in § 3345(b)(2)(A), which provides an additional exception to subsection (b)(1) for any "person [who] is serving as the first assistant to the office of an officer described under subsection (a)." But if, as the Government maintains, "a person" in subsection (b)(1) means *only* "first assistant," there would be no need for a separate exception under subsection (b)(2)(A) for any "person" serving as first assistant. In fact, the very phrase "person [who] is serving as the first assistant" would be rendered wholly redundant under the Government's reading (*e.g.*, "first assistant [who] is serving as the first assistant"). In contrast, straightforwardly construing "person" in § 3345(b)(1) to reach all acting officers avoids such redundancy altogether.

Similarly, the word "notwithstanding" appears five times throughout § 3345, yet the Government urges a meaning other than "in spite of" or "despite" only in subsection (b)(1). Construing the word "notwithstanding" in (b)(1) differently from how that same word is construed elsewhere in the statute

violates the venerable "presumption that a given term is used to mean the same thing throughout a statute." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 743 (2014). At the same time, Congress used the phrase "for purposes of" in subsection (c)(2), again confirming that it knows how to use such limiting language when it wants to.

Reading the term "notwithstanding" in § 3345(b)(1) to mean "despite" (rather than "for purposes of") avoids violating another interpretative rule that the Government seeks to disregard—the prohibition on rendering statutory language superfluous. If subsection (b)(1) limits only first assistants under subsection (a)(1), then subsection (b)(1)(A)(i)'s subsequent reference to persons who "did not serve in the position of first assistant to the office of such officer" would be nothing more than surplusage.

In sum, because the FVRA's overall statutory scheme clearly reinforces the D.C. Circuit's conclusion that § 3345(b)(1) applies to all acting officials, the decision below should be affirmed.

II. EVEN IF THE INTENDED SCOPE OF § 3345(b)(1) IS AMBIGUOUS, DEFERRING TO THE GOVERNMENT'S INTERPRETATION IS UNWARRANTED

WLF agrees entirely with the appeals court's well-reasoned conclusion that § 3345(b)(1)'s meaning is "clear." Pet. App. 18a. But even if this Court were to conclude that the statute's meaning is somehow ambiguous, the Government's interpretation would not be entitled to any deference.

Throughout its brief, the Government heaps great significance on the Executive Branch's "longstanding interpretation" of the FVRA over the past 18 years. *See, e.g.*, Pet. Br. at 13 ("From the enactment of the FVRA until the court of appeals' decision here, Presidents of both parties have made acting designations and nominations ... on the understanding that Subsection (b)(1) constrains acting service only by first assistants pursuant to Subsection (a)(1)."). Seeking further to bolster that interpretation, the Government relies on an OLC guidance document and a letter from the GAO. But whether considered under *Chevron* or otherwise, the Government's self-serving view is wholly unworthy of deference.

A. The Government's Interpretation of the FVRA Does Not Qualify for *Chevron* Deference

Consistent with *Chevron*, this Court has recognized that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865-66 (1984)). All agency interpretations, however, are not entitled to deference. In *United States v. Mead Corp.*, the Court clarified that an agency's interpretation qualifies for deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. 218, 226-

27 (2001); *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587-88 (2000). *Chevron* deference thus comes into play only when an agency offers a binding interpretation of a statute it administers.

Here, the Government relies on an OLC memorandum that flatly asserts, without any analysis or elaboration, that § 3345(b)(1)'s limitation applies only to first assistants. *See* Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 64 (1999). The Government also cites a GAO letter to then-U.S. Senator Fred Thompson as further confirmation of its view that "Subsection (b)(1) ... appli[es] only to first assistants who serve as acting officials under Subsection (a)(1)." Pet. Br. at 15 (citing Letter from Carlotta C. Joyner, Director, Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R, at 2-4 (Feb. 23, 2001)). Neither of these documents merits deference.

Because neither OLC nor GAO is charged with administering the FVRA,[3] binding deference under *Chevron* is simply unavailable. *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990) ("A

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[3] The Government portrays the GAO as "an instrumentality of Congress that plays a congressionally assigned role in the FVRA's enforcement." Pet. Br. at 14. But that "congressionally assigned role" is strictly limited to simply reporting violations of § 3346's 210-day time limit for acting officers. GAO has *no* congressionally assigned role with respect to § 3345.

precondition of deference under *Chevron* is a congressional delegation of administrative authority."); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (emphasizing that OLC "advisory opinions" are "not an administrative interpretation that is entitled to deference under *Chevron*."). Although agency determinations within the scope of delegated authority are entitled to deference, it is well settled "that an agency may not bootstrap itself into an area in which it has no jurisdiction." *Fed. Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

Moreover, even if the OLC or the GAO administered the FVRA—they clearly do not—informal statements such as guidance documents and letters do not qualify for *Chevron* deference. "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen*, 529 U.S. at 587; *Carter v. Welles-Bowen Realty, Co.*, 736 F.3d 722, 726 (6th Cir. 2013) ("Agency recommendations of this sort, even when cast as policy considerations or preferences, do not bind courts tasked with interpreting a statute."). And the Government's litigating position in this case (and in previous cases) is even less deserving of deference. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) ("Deference to what appears to be nothing more than [the Government's] convenient litigating position would be entirely inappropriate.").

B. Any Deference Is Inappropriate Given the Important Separation-of-Powers Concerns that Gave Rise to the FVRA

Deference (of any sort) is wholly inappropriate in this case given the larger, constitutional concerns that gave rise to the FVRA in the first place. As this Court has long recognized, the "separation of powers was not simply an abstract generalization in the minds of the Framers." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). Rather, it provides "structural protections against abuse of power," whose enforcement the Framers deemed "crucial to preserving liberty." *Free Enter. Fund*, 561 U.S. at 501.

One such indispensable structural protection is the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, which checks executive power by requiring the President to obtain "the Advice and Consent of the Senate" *before* appointing officers of the United States. After Presidents from both political parties routinely flouted that requirement, Congress passed the FVRA to prevent the President from circumventing Senatorial prerogatives. Yet if the Executive Branch is permitted to interpret the FVRA entirely as it sees fit—by receiving deference from this Court—then the very structural protections guaranteed by the Appointments Clause and fortified by the FVRA will be rendered illusory. "This Court does not defer to the other branches' resolution of such controversies." *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2593 (2014).

That is why the Court has steadfastly refused to defer to *any* of the political branches on questions affecting the separation of powers. In *Clinton v. New York City*, 524 U.S. 417 (1998), for example, the Court evaluated the constitutionality of the line-item veto without ever expressing the need to defer to the other branches' judgments. And in *Morrison v. Olson*, 487 U.S. 654 (1988), Justice Scalia noted that he could "not find anywhere in the Court's opinion the usual, almost formulary caution that we owe great deference to Congress' view that what it has done is constitutional." *Id.* at 704-05 (Scalia, J., dissenting). More recently, in *Free Enterprise Fund*, the Court emphasized that "the separation of powers does not depend on the views of individual Presidents, nor [even] on whether 'the encroached-upon branch approves the encroachment.'" 561 U.S. at 3155 (quoting *New York v. United States*, 505 U.S. 144, 182 (1992)).

The lack of deference to both executive and legislative judgments on these issues flows from the recognition that "separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 878-79 (1991) ("[W]e are not persuaded by the [Government's] request that this Court defer to the Executive Branch's decision that there has been no ... encroachment on ... prerogatives under the Appointments Clause."). That same concern should animate the Court's approach to statutory construction in this case, where deferring to the Petitioner's view of § 3345(b)(1) could stop it from preventing the Executive Branch from "aggrandizing its power at the expense of another branch," or

ensuring that "the carefully defined limits on the power of each Branch" are not eroded. *INS v. Chadha*, 462 U.S. 919, 957-58 (1983).

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In sum, because the Government's interpretation of § 3345(b)(1) is not entitled to deference, the Court should affirm the panel's holding below.

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court affirm the decision below.

Respectfully submitted,

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No. 15-1251

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, ALABAMA, AND 12 OTHER STATES IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Section 3345(b) of the Federal Vacancies Reform Act, 5 U.S.C. § 3345, *et seq.*, limits when a permanent nominee for a vacant office may also serve temporarily as the acting official. The question presented is whether that limitation applies to all temporary officials serving under 5 U.S.C. § 3345(a), or whether it is irrelevant to officials who assume acting responsibilities under Subsection (a)(2) and (a)(3).

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

This case is significant to *amici curiae*—the States of West Virginia, Alabama, Arizona, Georgia, Kansas, Michigan, Montana, Nevada, Ohio, Oklahoma, South Carolina, Texas, Utah, and Wisconsin—because its outcome is critical to protecting the States against federal encroachment by preserving the Senate's constitutionally mandated advice and consent power.

In our constitutional system, the separation of powers protects both state sovereignty and individual liberty. The Constitution preserves the States' "residuary sovereignty," The Federalist No. 62, at 376 (James Madison) (C. Rossiter ed. 1961) (The Federalist), by granting the States equal representation in the Senate. The power to provide advice and consent on executive appointments is one important tool the Senate uses to check executive power and, accordingly, protect the States' sovereign interests and individual freedoms.

At issue here is the President's attempt to circumvent the Senate's role, and by extension the States' role, in the appointments process. The question presented is the extent to which the Federal Vacancies Reform Act ("FVRA") limits the President's ability to install his nominee on a temporary basis as an "acting officer" in the same position before the Senate has an opportunity to advise and consent. The NLRB argues that the statutory limitation applies only to a small subset of people who could permissibly serve as acting officer

under the statute. As persuasively explained by SW General, such reading is contrary to the clear text of the FVRA, which Congress enacted to secure the Senate's ability to advise and consent on presidential nominees.

As set forth below, canons of constitutional avoidance and federalism provide further reason for this Court to reject the NLRB's expansive view that the FVRA authorizes the President to install as acting officer any nominee who is currently serving in a GS-15 salaried position or higher within the agency or another position requiring Presidential appointment and Senate confirmation ("PAS positions"). This reading would provide the President with more latitude to install a broader range of potential nominees in an acting capacity, over a longer period of time, than any historical antecedent to the FVRA. If the NLRB prevailed, the President could install nominees in a host of positions with broad policymaking authority before the Senate had an opportunity to advise and consent. This Court should reject this reading, which raises significant concerns about whether Congress has improperly delegated or abdicated its constitutional responsibilities.

The NLRB's reading would also have significant adverse impact on the States, as unchecked federal agencies can and frequently do upset the constitutional balance of federal and state powers through regulatory overreach. The Senate's advice and consent power provides an important check on these federal encroachments. Allowing the President to circumvent advice and consent by routinely

installing his preferred nominee in office in an acting capacity would eviscerate an important constitutional check on executive power, and by extension, impair the federal-state balance. Absent a clear statement from Congress, this Court should not interpret the FVRA in a way that would provide the President with such untrammeled power.

SUMMARY OF ARGUMENT

I. When left unchecked, federal agencies can upset the balance of federal and state powers, especially when regulating in areas of traditional state responsibility. They do so primarily by attempting to expand federal authority at the expense of state laws. This Court has long recognized that the structural protections of the Constitution, including the advice and consent power, are important means to protect the States, and by extension the people, from encroachment from federal regulatory overreach. See *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 882–84 (1991).*Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 (1985); *Myers v. United States*, 272 U.S. 52, 119–20 (1926).

II. The role of the advice and consent power in protecting the States is not merely academic. Rather, the Senate has repeatedly used this power to resist executive appointments that would, in the Senators' views, upset the federal-state balance. As Senate hearings on three recent nominations demonstrate, the States' representatives in Congress are keenly aware of, and exercise, their constitutional obligation

to protect the federal-state balance and preserve individual liberties.

III. SW General has persuasively shown in its brief that the FVRA plainly prohibits the President from selecting the same person as both acting officer and permanent nominee unless that person is an experienced first assistant. To the extent that the Court deems the text susceptible of multiple interpretations, however, principles of constitutional avoidance and federalism reinforce and compel SW General's interpretation.

The NLRB's reading, if adopted, would allow the President to install a vast number of individuals to high-ranking federal offices without first obtaining the Senate's advice and consent. Congress may not abdicate its advice and consent power in this manner, see *Freytag*, 501 U.S. at 880, and this Court should reject an interpretation that would raise such serious constitutional concerns, *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014).

And because the Senate's advice and consent power ultimately protects the States, Congress must provide a clear statement if it intends to "override[] the usual constitutional balance of federal and state powers." *Bond*, 134 S. Ct. at 2089; see also *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991). Congress did not provide any such clear statement here. To the contrary, it is plain from the text of the FVRA, and from the historical circumstances that led to its adoption, that Congress intended to strengthen and preserve its historic advice and consent power, not diminish it.

In short, traditional canons of construction confirm what the plain text already makes clear—that the FVRA cannot be read to provide the President with broad authority to anoint the same person as both acting officer and permanent nominee.

ARGUMENT

I. Separation Of Powers, Including The Advice And Consent Power, Protects Both The States And Individual Liberties.

The Constitution protects the sovereignty of the States through the separation of powers and, in particular, through the Senate as the representative of the States in Congress. The Senate's advice and consent power, as elucidated in the FVRA, is a critical tool that the Senate uses to check executive power and protect state interests.

The federal government's powers are not derived from "the consent of the undifferentiated people of the Nation as a whole," but rather from "the consent of the people of each individual State." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting). The Constitution became effective only upon ratification by conventions of nine States and went into effect only between the States that ratified it. U.S. Const. art. VII. As James Madison explained, the consent to the Constitution was "given by the people, not as individuals composing one entire nation, but composing the distinct and independent States to which they

respectively belong." *U.S. Term Limits*, 514 U.S. at 846 (Thomas, J., dissenting) (quoting The Federalist No. 39, p. 243 (C. Rossiter ed. 1961)).

The enumeration of the federal government's limited powers "leaves to the several States a residuary and inviolable sovereignty over all other objects." *Ibid.* "Any interference with [the States' legislative or judicial power] except as thus permitted [by the Constitution], is an invasion of the authority of the State and, to that extent, a denial of its independence." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549–50 (1985) (quotation omitted).

The States' "residuary and inviolable sovereignty" is protected in part by the Constitution's separation of powers. "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the . . . National government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Texas v. White*, 7 Wall. 700, 725 (1869)). Indeed, the separation of powers is "the principal means chosen by the Framers to ensure the role of the States in the federal system." *Garcia*, 469 U.S. at 550. As "James Wilson observed[,] . . . 'it was a favorite object in the Convention' to provide for the security of the States against federal encroachment and that the structure of the Federal Government itself served that end." *Id.* at 551 (quoting 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 438–39 (J. Elliot 2d. ed. 1836)). The federal government was designed to "partake sufficiently of the spirit [of the States], to be

disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist No. 46, p. 293.

The Constitution's recognition of state sovereignty is not merely an end in itself. Rather, "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). By protecting the interests of the States, the separation of powers ultimately secures "'the liberties that derive'" to individual citizens "'from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)); see also *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("Separation of powers operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised.").

The Senate, in particular, was designed to protect state interests. The States are equally represented in the Senate regardless of population, U.S. Const. art. I, § 3, a feature James Madison viewed as "at once a constitutional recognition of the portion of sovereignty remaining in the individual States and an instrument for preserving that residuary sovereignty." The Federalist No. 62, p. 376. In other words, "'the residuary sovereignty of the States [is] implied *and secured* by that principle of representation in one branch of the [federal] legislature' (emphasis added). The Federalist No. 43, p. 315 (B. Wright ed. 1961). See also *McCulloch v. Maryland*, 4 Wheat. 316, 435 (1819)." *Garcia*, 469

U.S. at 551 (emphasis in *Garcia*). Also, a State may not be deprived of its equal representation in the Senate without its consent even through adoption of a constitutional amendment. U.S. Const. art. V. Overall, the Senate is to "function as the forum of the states" and "is intrinsically calculated to prevent intrusion from the [federal government] on subjects that dominant state interests wish to preserve for state control." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 546, 548 (1954).

Senate supervision of executive appointments furthers the protection of state interests from federal intrusion. The advice and consent power in Article II is a "significant structural safeguard[] of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997); see also The Federalist No. 70, p. 421 (Hamilton) (describing the President's appointment power as "concurrent" with the Senate, in contrast with the British monarch who was "the sole author of all appointments."). Indeed, "[t]he manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883 (1991) (internal quotation and citation omitted). The Founders therefore hoped that "[t]he equal representation of the states in the Senate and the voice of that branch in the appointment to offices will secure the rights of the lesser as well as of the greater states." *Myers v.*

United States, 272 U.S. 52, 120 (1926) (internal quotation omitted); see also The Federalist No. 76, at 456 (Hamilton) (noting that advice and consent power would serve as an "excellent check upon a spirit of favoritism" and "prevent[] the appointment of unfit characters from State prejudice," among other things).

II. The Senate Frequently Exercises Its Advice And Consent Power To Protect The States.

The danger to state interests from unchecked executive appointments is not merely theoretical. To the contrary, appointees to federal agencies wield enormous influence and their actions can affect the balance of state and federal authority through overreaching regulations. Accordingly, when the President puts forward a nomination, the Senate frequently exercises its advice and consent power to protect the States.

For example, Senators often question nominees about their views of certain policies that significantly interfere with state authority and interests. There are numerous examples of this, but the *amici* States highlight three recent nominations that exemplify this practice. In these cases, the Senate either rejected or declined to take action on one of the President's nominees.

A. In January 2014, the President nominated Janet McCabe to serve as Assistant Administrator for the Office of Air and Radiation at the Environmental Protection Agency ("EPA"). After

serving as the Principal Assistant Administrator,[1] Ms. McCabe became Acting Assistant Administrator one year earlier. Ms. McCabe was nominated to fill the position permanently in January 2014[2] and again in June 2015.[3]

In the Senate Committee on the Environment and Public Works, which considered Ms. McCabe's nomination, senators questioned her about the effect that EPA's rules regulating CO_2 emissions would have on the States.[4] In brief, after Congress declined to pass legislation authorizing a program requiring reductions in CO_2 emissions, President Obama

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[1] Press Release, The White House, President Obama Announces More Key Administration Posts (Dec. 19, 2013), available at https://www.whitehouse.gov/the-press-office/2013/12/19/president-obama-announces-more-key-administration-posts.

[2] *PN1293—Janet Garvin McCabe—Environmental Protection Agency*, Congress.gov (2014), https://www.congress.gov/nomination/113th-congress/1293?q=%7B%22search%22%3A%5B%22janet+mccabe%22%5D%7D&resultIndex=2. (last visited Sept. 23, 2016).

[3] *PN597—Janet Garvin McCabe—Environmental Protection Agency*, Congress.gov (2015), https://www.congress.gov/nomination/114th-congress/597?q=%7B%22search%22%3A%5B%22janet+mccabe%22%5D%7D&resultIndex=1 (last visited Sept. 23, 2016).

[4] *Hearing on the Nominations of Janet G. McCabe to be Assistant Administrator for Air and Radiation of the U.S. Environmental Protection Agency (EPA), Ann E. Dunkin to be Assistant Administrator for Environmental Information of the EPA, and Manuel H. Ehrlich, Jr., to be a Member of the Chemical Safety and Hazard Investigation Board: Hearing before the Subcomm. on Env't and Pub. Works*, 113 Cong. (2014) (hereinafter McCabe Hearing).

issued the "Climate Action Plan"[5] and ordered the EPA to mandate reductions in CO_2 emissions from power plants.[6] EPA then adopted a rule under section 111(d) of the Clean Air Act ("CAA") for CO_2 emissions from existing fossil fuel-fired electric generating units. 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Power Plan"). The Power Plan requires States to fundamentally change the mix of electricity generation in their States, and thus encroaches on the States' "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like," *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983). Ms. McCabe played a central role in developing the Power Plan while serving as Acting Assistant Administrator.

Thus, in committee, Senator Jim Inhofe questioned Ms. McCabe on the EPA's commitment to allowing the States true flexibility in achieving the CO_2 emissions standards under Section 111(d) of the CAA. McCabe Hearing, at 50. He also noted a Senate committee report finding that a majority of States have expressed concerns about the "EPA's failure to adhere to the Clean Air Act's cooperative federalism design." *Id.* at 65 (internal quotation omitted). Senator Jeff Sessions similarly noted a white paper

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[5] Executive Office of the President, *The President's Climate Action Plan* (June 2013), available at https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf.

[6] *Power Sector Carbon Pollution Standards: Memorandum for the Administrator of the Environmental Protection Agency* (June 25, 2013), 78 Fed. Reg. 39,535, 39,535-36 (July 1, 2013).

authored by a number of state attorneys general explaining the States' role in determining emissions standards under Section 111(d). *Id.* at 55.

Similarly, Senator John Barrasso explained the detrimental effect the rule would have in his home State of Wyoming: "People in Wyoming think this agency is behaving in an extreme fashion. Many of the policies coming out of EPA's Air and Radiation Office are the cause of the beliefs I am hearing from the people around the State of Wyoming." McCabe Hearing, at 4. Specifically, the Senator noted that the closure of power plants would have severe economic consequences on Wyoming. *Id.* at 5.

Senator David Vitter similarly questioned whether EPA and Ms. McCabe were "committed to honoring [the] cooperative federalism structure" of the CAA and allowing States to take "the lead in setting case-by-case emission standards." McCabe Hearing, at 27. The Senator further urged Ms. McCabe, if confirmed, to streamline the "process through which states are afforded an opportunity to exempt air quality standard exceedances caused by naturally occurring events outside of their control." *Id.* at 42.

After facing opposition from several senators on federalism grounds, Ms. McCabe's nomination failed to leave committee and has not received a full vote by the Senate.[7]

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[7] *PN597—Janet Garvin McCabe—Environmental Protection Agency*, Congress.gov (2015), https://www.congress.gov/nomination/114th-congress/597?q=%7B%22search%22%3A%5B%22jane

B. A second example involves the President's nomination of Rhea Sun Suh to be Assistant Secretary of the Interior for the National Park Service and the U.S. Fish and Wildlife Service. Prior to her nomination, Ms. Suh served as the Assistant Secretary of the Interior for Policy, Management, and Budget.[8] The two Senate committees with jurisdiction, the Committee on Environment and Public Works and the Committee on Energy and Natural Resources, held hearings in which senators expressed concerns about the "balance of power between the States and the Federal Government," *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

Several senators questioned Ms. Suh about the agency's commitment to consulting with States and communities before taking action affecting local laws and policies. Senator Vitter, for example, questioned Ms. Suh about the Interior Department's "practice of negotiating closed door settlement agreements . . . that exclude from the discussion the folks directly impacted." Suh EPW Hearing, at 7. He noted in particular the Fish and Wildlife Service's failure to

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[8] *Hearing on the Nominations of Rhea Sun Suh to be Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior; Victoria Baecher Wassmer to be Chief Financial Officer, U.S. Environmental Protection Agency (EPA); Roy K.J. Williams to be Assistant Secretary of Commerce for Economic Development, U.S. Department of Commerce; and Thomas A. Burke to be Assistant Administrator for Research and Development, EPA: Hearing Before the S. Comm. on Env't and Pub. Works*, 113 Cong. 32 (2013) (hereinafter Suh EPW Hearing).

consult with state and local governments on a settlement agreement requiring the Service to make listing determinations for more than 250 species. *Id.* at 46, 49. He explained that the agreement "is of substantial concern to many states" because it would interfere with the States' on-going efforts to protect wildlife and avoid the need for listing determinations. *Id.* at 49. Senator John Boozman likewise noted "the failure of the Department to engage with communities and citizens before taking action." *Id.* at 22, 79. As Senator Vitter explained, "[t]hat sort of overreach is . . . exactly why [the Senate's] role with regard to executive nominations is so important." *Id.* at 8.

A number of senators also questioned Ms. Suh about her views on the States' role as sovereign regulators and whether she would support federal policies that preempt or otherwise displace state authority. Senator Tim Scott asked about Ms. Suh's views on state regulation of hydraulic fracturing and whether the federal government should have the authority to regulate it on state and private lands. Suh Energy Hearing, at 52–53. Senator Lisa Murkowski asked under what conditions Ms. Suh would find it appropriate for the federal government to interfere with the States' right to manage wildlife by reversing a state wildlife decision. *Id.* at 49. Similarly, Senator Barraso asked Ms. Suh how she would "ensure that federal authority does not adversely impact" state efforts to protect the sage grouse. *Id.* at 59. Senator Barrasso asked whether Ms. Suh would "block natural gas production in places like Wyoming, Alaska, New Mexico, West Virginia, Louisiana, and others." Suh EPW Hearing,

at 23. The Senator further asked whether Ms. Suh would "use [her] office to federalize a significant amount of Wyoming's private land?" *Id.* at 73.

Ms. Suh's nomination was ultimately voted out of committee but failed to receive a full vote on the floor. President Obama ultimately withdrew the nomination.[9]

C. A third example involves a nominee to the NLRB, the petitioner in this case. During Craig Becker's nomination to be a member of the Board in 2010, senators raised concerns that he would implement policies displacing state labor laws. Senator Richard Burr, for example, asked Mr. Becker whether he would seek to interfere with right to work laws in North Carolina and other States.[10] In response, Mr. Becker acknowledged that the National Labor Relations Act allows States to enact laws that prohibit employers from conditioning employment on union membership and represented that he would not interfere with any such law if confirmed. Becker Hearing, at 27. Becker ultimately was not confirmed by the 111th Congress[11] but was

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[9] *PN1068—Rhea Sun Suh—Department of the Interior*, Congress.gov (2014), https://www.congress.gov/nomination/113th-congress/1068?q=%7B%22search%22%3A%5B%22rhea+suh%22%5D%7D&resultIndex=3 (last visited Sept. 23, 2016).

[10] *Nomination of Craig Harold Becker: Hearing of the S. Comm. on Health, Educ. Labor and Pensions*, 111 Cong. 27 (2010) (hereinafter Becker Hearing).

[11] *PN 1647—Craig Becker—National Labor Relations Board*, Congress.gov (2010) https://www.congress.gov/nomination/111th-

later installed by the President through a recess appointment.[12] Ten months later, several senators again expressed their opposition to Mr. Becker's appointment, explaining that during his tenure, the NLRB threatened four States with lawsuits over provisions that protected the secret ballot in union elections.[13]

These three examples, and others like them, demonstrate that Senators take their role as the States' representatives in Congress seriously, and that they often exercise their advice and consent power to reject or decline to take action on nominees who they believe could upset the federal-state balance.

III. The FVRA Should Be Interpreted To Preclude NLRB's Reading In Light Of Significant Separation Of Powers and Federalism Concerns.

The importance of separation of powers, and the advice and consent role, in protecting the States from executive overreach highlights the need for this

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congress/1647?q=%7B%22search%22%3A%5B%22craig+becker%22%5D%7D&resultIndex=2 (last visited Sept. 23, 2016).

[12]Press Release, The White House, President Obama Announces Recess Appointments to Key Administration Positions (Mar. 27, 2010), available at https://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions.

[13] Letter from Senator Michael Enzi et al. to President Barack Obama (Feb. 1, 2011), available at http://indianachamberblogs.com/wp-content/uploads/Becker%20Nomination%202011.pdf.

Court's vigilant enforcement of the FVRA's limits on the President's authority to install acting officers in case of vacancies while the Senate considers a permanent nomination.

SW General has persuasively explained how the text of the FVRA unambiguously forecloses the President from making the appointment at issue here. But even if there were uncertainty on that point, canons of constitutional avoidance and federalism weigh decisively in favor of SW General's reading of the statute. The NLRB's contrary reading of the FVRA would provide the President with unprecedented latitude to install his preferred nominee as acting officer in derogation of the Senate's advice and consent power and historic role as protector of the States' interests in Congress. The Court should decline the invitation to alter the separation of powers and federal-state balance in this manner.

A. The NLRB's Reading of the FVRA Would Impermissibly Abdicate The Senate's Historic Advice and Consent Power to the President.

The Constitution provides the default rule that presidential appointments of "Officers of the United States," among others, must be submitted to the Senate for advice and consent. U.S. Const. art. II, § 2. The Constitution further provides a limited exception for the President to make recess appointments for "Vacancies that may happen during the Recess of the Senate." *Ibid.*; *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2556 (2014). While the

Senate remains in session, however, the Constitution does not provide an explicit mechanism for the federal government to staff critical positions between the time when a position becomes vacant and when the Senate confirms a permanent nominee. *E.g.*, *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 209–11 (D.C. Cir. 1998) (providing history of Congressional legislation on acting officers).

Therefore, since 1792, Congress has enacted carefully calibrated statutes intended as temporary stopgap measures to provide it with adequate time to exercise its constitutional obligation to advise and consent. The statutes authorize the President to name acting officers to fill key positions temporarily after a vacancy occurs but before a nominee is confirmed. *Doolin*, 139 F.3d at 205. These statutes historically have carefully restricted either the time during which an acting officer may serve or the universe of people who may serve as an acting officer or both. *Id.* at 210.

From the Founding period to the enactment of the FVRA, the statutory period during which an acting officer could serve was relatively short—varying from ten days to six months.[14] Starting in 1863, the

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[14] The six-month time limit was established in 1792 and remained in effect until 1868. *Doolin*, 139 F.3d at 210; Act of Feb. 13, 1795, ch. 21, 1 Stat. 415. The Second Congress adopted this time limit against the backdrop of exceptionally speedy confirmation proceedings—Thomas Jefferson and Alexander Hamilton, for example, were both confirmed to George Washington's cabinet within a day of their nominations. *Doolin*, 139 F.3d at 209. Congress reduced this time limit to 10 days in

law limited the individuals who could serve as acting officials to already-appointed executive officers. Act of Feb. 20, 1863, ch. 45, 12 Stat. 656. In 1868, the Vacancies Act further limited the President's choice of acting officers to those who served as first or sole assistant to that officer or to someone who had already been previously appointed as a constitutional officer to another post and confirmed by the Senate. The version of the Act in effect immediately prior to the FVRA placed a 120-day limit on the service of acting officers in most cases, and retained the limits on the universe of people that the President could appoint to such interim positions. *Doolin*, 139 F.3d at 206; 5 U.S.C. §§ 3345, 3348 (1996). Congress also clarified that the Vacancies Act applied to all executive agencies other than the General Accounting Office. The Vacancy Act (1988 Amendments), Pub. L. No. 100-398, § 7(a), 102 Stat. 985, 988.

As federal agencies grew in size and number, however, American presidents attempted to circumvent the Senate's advice and consent function by bypassing the limitations in the Vacancies Act, claiming for example that particular agencies or positions were exempt from the law's reach. See S. Rep. No. 105–250, at 3.

Congress therefore enacted the FVRA to reclaim its constitutional prerogative to advise and consent

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1868, then increased it to 30 days in 1891. *Id.* at 210. That time limit was expanded again to 120 days in 1988. *Id.* at 210; Presidential Transition Act of 1963,, Pub. L. No. 100–398,§7(b), 102 Stat. 988.

on presidential nominees. *Id.* at 4–5. The Senate report accompanying the bill explained that the scope of the FVRA "must be government-wide unless Congress chooses *clearly and specifically* to exempt specifically identified officers from its reach when countervailing considerations apply." S. Rep. No. 105-250, at 5 (emphasis added). Senator Robert Byrd, a sponsor of the legislation, likewise indicated in a committee hearing that he intended to fashion the FVRA to make it "'so tight, so air-tight, that no department can find a crack or crevice anywhere through which to creep.'" *Id.* at 9 (internal citation omitted). Congress viewed as "imperative" the importance of preserving its advice and consent role over executive appointments because "the issue is not simply the prerogative of the Senate." *Id.* at 8. Rather, "[l]ike other structural constitutional provisions, the Appointments Clause was designed to protect the liberty of the people." *Id.*

In furtherance of these goals, Congress in the FVRA set limitations applying to all federal officers who were subject to the requirements of presidential appointment and Senate confirmation. 5 U.S.C. § 3345. The FVRA, however, provided the President with additional flexibility in naming acting officers in other respects. For example, it increased the length of time in which an acting officer could serve from 120 to 210 days. 5 U.S.C. § 3346. It also extended the universe of people who could serve as acting officer to any officer or employee of the agency who was paid at a GS-15 salary or above and had served for more than 90 days. 5 U.S.C. § 3345. But, as SW General explains in detail in its brief, the FVRA also prohibited the President from naming as

an acting officer the same person that he nominated for the permanent position, unless that person was an experienced first assistant (i.e., served as first assistant in the same position for more than 90 days) or a Senate-confirmed first assistant. *Ibid.*

The NLRB, by contrast, incorrectly reads the FVRA to reach significantly beyond providing stopgap measures to fill vacancies. NLRB reads the statute as exempting potentially thousands of GS-15 employees and officials holding PAS positions from the statute's prohibition on the same person serving as both acting officer and nominee. SW General Br. 36–46. If adopted, the NLRB's position would provide the President with authority to install preferred candidates into offices prior to Senate review to an extent beyond that previously permitted under the Vacancies Act. This Court should reject this invitation, because the plain text of the FVRA prohibits it. But the same result also obtains under the traditional canon of constitutional avoidance.

Under the avoidance doctrine, where a statute is susceptible of two plausible interpretations, this Court should adopt the reading that avoids serious constitutional questions. *Bond*, 134 S. Ct. at 2087. The NLRB's reading of the FVRA raises serious concerns about whether Congress had impermissibly abdicated its duty to advise and consent on presidential appointments that SW General's reading does not.

As explained above, the Advice and Consent Clause protects against the President's appointment of unqualified persons who might be chosen merely

by virtue of their familiarity with the President, local attachments, or partiality. *See supra* at pp. 5–9. Under SW General's interpretation of the statute, only experienced first assistants could serve as both the President's nominee and as a temporary acting officer. For at least two reasons, this arrangement should not ordinarily raise constitutional concerns. First, experienced first assistants represent a small, identifiable universe of employees that Congress has, from at least 1863, repeatedly concluded possess the necessary qualifications to serve as acting officers. *See Doolin*, 139 F.3d at 210; Vacancy Act of July 23, 1868, ch. 227, 15 Stat. 168; Vacancy Act of Feb. 6, 1891, ch. 113, 26 Stat. 733; Presidential Transition Act of 1963 (1988 Amendments), Pub. L. No. 100–398, § 7(b), 102 Stat. 988. Second, as the archetypal civil servants, first assistants do not raise the same concerns about partiality and inexperience that motivated the Founders to adopt the Advice and Consent Clause. S. Rep. No. 105–250, at 12.

The NLRB's reading of the statute, by contrast, would open the door to numerous employees in any position within an agency at or above a particular salary level from serving as both nominee and acting officer, advancing the President's policy agenda before the Senate can act on the nomination. Moreover, the FVRA contains a provision (preserved from the prior Vacancies Act) that tolls the 210-day limit for acting officers when a nomination is delivered to the Senate. 5 U.S.C. § 3346. Therefore, unless the Senate acts on a nomination, the President's choice could continue serving as acting officer indefinitely.

Congress cannot, and did not, provide the executive with a blank check to make appointments in this manner. The Constitution prevents Congress from delegating its enumerated powers to the President or any other person or body. *Freytag*, 501 U.S. at 880; *Mistretta v. United States*, 488 U.S. 361, 371–72 (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)). This principle applies to the Appointments Clause, which "prevents Congress from dispensing power too freely," and "limits the universe of eligible recipients of the power to appoint." *Freytag*, 524 U.S. at 880. "For example, the Clause forbids Congress from granting the appointment power to inappropriate members of the Executive Branch," and "[n]either Congress nor the Executive can agree to waive this structural protection." *Ibid.*

Here, the NLRB's reading of the FVRA would raise serious concerns about whether Congress had impermissibly delegated or abdicated its power to advise and consent to the President. If the President were permitted to install any agency employee as acting officer before the Senate had an opportunity to advise and consent, the "undeniable effects" would be to "enhance the President's power to reward one group and punish another, to help one set of taxpayers and hurt another, [or] to favor one State and ignore another." *City of New York*, 524 U.S. at 451 (Kennedy, J., concurring). This Court should not interpret the FVRA to undermine the structural protections of the Constitution in this manner to the detriment of the States and the people.

It is no answer to note that this Court has at times permitted Congress to delegate rulemaking

authority to federal agencies so long as Congress articulates an "intelligible principle" to guide agency discretion. *Mistretta*, 488 U.S. at 372; *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 843–44 (1984). As the D.C. Circuit correctly noted in this case, Congress did not entrust the NLRB with the authority to administer the FVRA, and therefore no deference is owed the NLRB with respect to its interpretation of the statute. *SW General, Inc. v. NLRB*, 796 F.3d 67, 74 n.4 (D.C. Cir. 2015) (citing *Soc. Sec. Admin. v. FLRA*, 201 F.3d 465, 471 (D.C. Cir. 2000)); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Moreover, this Court has never extended the concept of *Chevron* deference outside the policymaking sphere to the realm of executive appointments. Where, as here, the Constitution specifically entrusts the Senate with the power to advise and consent, Congress may not delegate that power, even if it has set certain broad parameters within which the President may act.

In short, the serious separation of powers concerns associated with the NLRB's reading of the FVRA provide an additional reason for this Court to interpret the statute according to its plain meaning and limit the President's ability to install nominees as acting officers prior to Senate confirmation.

B. Congress Has Not Clearly Expressed An Intent To Alter The Federal-State Balance By Expanding The President's Authority To Install Nominees As Acting Officers.

As explained above, the NLRB's position if adopted would also raise serious federalism concerns given the importance of advice and consent for protecting state interests. A permissive reading of the FVRA would allow the President to circumvent the Senate's advice and consent role, which serves as an important protection for state interests, in a host of novel circumstances. Even if the text of the FVRA allowed for this reading, which it does not, Congress must plainly express such an intention to upend the federal-state balance. It has not done so here.

This Court has explained that "Congress legislates against the backdrop" of certain presumptions, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), including "the relationship between the Federal Government and the States under our Constitution." *Bond* 134 S. Ct. at 2088. For example, this Court presumes federal statutes do not abrogate state sovereign immunity, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985); impose obligations on States under section 5 of the Fourteenth Amendment, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16–17 (1981); or preempt state law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Similarly, it is "incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state

powers." *Bond*, 134 S. Ct. at 2089 (quoting *Gregory*, 501 U.S. at 460).

For example, this Court in *Bond* rejected a reading of the term "chemical weapon" in the federal Chemical Weapons Convention Implementation Act that would "reach purely local crimes," 134 S. Ct. at 2090. The question presented was whether the statute, which defined "chemical weapon" broadly as any toxic chemical used for other than peaceful purposes, *id.* at 2084, prohibited the local use of a chemical that caused a minor thumb burn, *id.* at 2083. Although the text of the Act might have included the conduct at issue, the Court rejected that reading as inconsistent with "principles of federalism inherent in our constitutional structure," *id.* at 2088, because it would "'dramatically intrude upon traditional state criminal jurisdiction.'" *Ibid.* (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)). The Court declined to read the statute in that manner because Congress had not clearly indicated its intent to upset "the relationship between the Federal Government and the States under our Constitution." *Ibid.*

This Court applied the same canon of construction to the selection of state government officials in *Gregory*, 501 U.S. at 460. The question there was whether the Missouri constitution's mandatory retirement provision for state judges violated the federal Age Discrimination in Employment Act ("ADEA"). *Id.* at 455–57. The Court concluded that, although the text of the ADEA was ambiguous as to whether state judges were exempt from the ADEA, reading the statute to limit the

State's ability to set qualifications for its officers upset the federal-state balance and required clear congressional authorization. *Id.* at 470. Allowing Congress to interfere with Missouri's "constitutional power to establish the qualifications" of state officers, *id.* at 461, this Court reasoned, "would upset the usual constitutional balance of federal and state powers," *id.* at 460.

This clear statement rule applies with equal force in this case. The NLRB's permissive reading of the FVRA would upset the usual balance of federal and state powers by diluting the Senate's historic advice and consent power. The current constitutional balance affords States, through their elected representatives in the Senate, an important role in advice and consent on executive appointments, see *supra* pp. 9–16, just as States traditionally have had the power to set qualifications for their own officers, *Gregory*, 501 U.S. at 461–62, and punish local criminal activity, *Bond*, 134 S. Ct. at 2089. This Court should similarly decline to read the FVRA to alter the existing balance of power on executive appointments absent clear congressional authorization.

Nothing in the FVRA indicates that Congress intended to limit its advice and consent role. To the contrary, as shown above, Congress repeatedly expressed its intent during the enactment process to *preserve* the Senate's advice and consent power. See S. Rep. No. 105–250 at 5, 12. This Court should not infer, based upon at most a dubious reading of statutory text, that Congress intended to abdicate that power here in a host of novel circumstances.

In short, federalism principles reinforce the conclusion that the FVRA does not authorize the President to direct a panoply of nominees to serve in an acting capacity pending hearings and a vote in the Senate. For this reason too, the Court should reject the NLRB's attempt to insulate presidential nominations from the Senate's advice and consent.

CONCLUSION

The decision below should be affirmed.

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